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No. ——

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

PETER V. ALEXANDER,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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92 pp

## QUESTIONS PRESENTED

1. Whether this Court's opinion in *Russell* v. *United States* may now properly be limited to sustain an indictment so vague as to allow a petit jury to return a conviction on a ground that the grand jury did not consider.

2. Whether the Confrontation Clause of the Sixth Amendment prohibits a non-expert witness in a criminal case from rendering an opinion based upon survey evidence.

3. Where the government is shown on the record to have applied an improper interpretation of *Brady* v. *Maryland* in deciding what evidence it is obliged to disclose to the defense, is the government then required to re-evaluate under the correct *Brady* standard all the evidence which it had withheld.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered in the United States District Court for the Eastern District of Virginia, Norfolk Division.

## OPINION BELOW

The opinion of the court of appeals is reported at 748 F.2d 185 and is printed in Appendix A, pp. 1a-16a.

## JURISDICTION

The judgment of the court of appeals was entered on October 22, 1984 (Appendix B). A timely petition for rehearing was denied December 11, 1984 (Appendix C).

On January 23, 1985, Chief Justice Burger extended the time for filing this Petition for Writ of Certiorari to and including March 11, 1985 (Appendix E).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254( ).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury . . . nor shall any person for the same offense to be twice put in jeopardy of life or limb . . . or be deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and the cause of the accusation; to be confronted with witnesses against him . . .

## STATUTES INVOLVED

The relevant portions of 18 U.S.C. §§ 2, 287 and 1341, and 42 U.S.C. § 1396 (h) are reprinted in Appendix F.

## STATEMENT OF THE CASE

On May 10, 1983 a forty count indictment was returned against petitioner Dr. Peter Alexander. App. G.[1] It was based on charges of fraudulent billings to three insurance companies that allegedly occurred in Alexander's gynecology practice in Virginia Beach.

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[1] References herein to "App." are to the Appendix to the Petition; references to "C.A." are to the Appendix filed in the Court of Appeals; references to "C.A. Exh. Vol." are to the Exhibit Volumes filed in the Court of Appeals.

The indictment alleged, with respect to its thirty-one mail fraud counts, that Alexander had engaged in an eight part scheme[2] to defraud the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"), Blue Cross/Blue Shield and Medicaid. The mail fraud counts did not, however, identify by name even one patient whose claim form was allegedly fraudulent. Instead, each count—with one exception—[3] simply identified a check; its amount; and the fact that it was mailed on a certain date by one of the three insurance providers.

At trial, the government's case was not that all the patient claims and services covered by a mailed check were fraudulent, or that Alexander's entire practice was a sham. Instead the government's case typically rested on the identification of one of many patient claim forms covered by the mailed check, and an explanation of why that particular form was alleged to be fraudulent.

Because the indictment itself contained no information concerning the identity of the patient or the nature of the claimed fraud(s) actually at issue in each mail fraud count, it was impossible for the petitioner to prepare his defense prior to trial. The enormity of the problem is illustrated by the following graphic analysis of the evidence presented by the prosecution on Counts 1 through 5:

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[2] The fraudulent practices charged included duplicating claims for the same services to more than one of the organizations; using procedure codes to submit false claims; falsely claiming to have performed certain medical tests; claiming to have performed pregnancy tests on sterilized women; claiming to have diagnosed illnesses to obtain compensation for routine office visits; claiming higher fees than those charged cash-paying patients; claiming to have provided "comprehensive" service instead of "brief" or "intermediate" service; claiming payment for post-operative visits covered in the surgery allowances. App. 32a-34a.

[3] The exception was Count One, where the indictment simply charged that an envelope was mailed on a certain date. App. 34a.

| Count | Amount of Check | No. of Claims Covered | No. of Allegedly Fraudulent Claims |
|---|---|---|---|
| Count 1 | $5752 | 78 | 1 |
| Count 2 | $1451 | 28 | 1 |
| Count 3 | $ 818 | 16 | 1 |
| Count 4 | $1255 | 14 | 1 |
| Count 5 | $2816 | 46 | 1 |

With respect to each patient claim actually at issue, the only way to prepare a defense was to look at the claim, hear the fraud actually charged concerning that claim, compare the claim to the patient's history and chart, compare the claim and the history to the applicable billing guidelines,[4] and interview the patient involved if the records were not clear. None of this could be done while the trial itself was in progress. The result was that the government's case came in virtually unchallenged—even though information on the government's own exhibits often conflicted with the theory of fraud its witnesses expounded.[5]

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[4] Checking the billing guidelines and rules for CHAMPUS alone, a task that requires consulting six loose-leaf notebooks as well as the Code of Federal Regulations, is time consuming, but essential. For example, one of the government's theories was that charging for post-operative visits was improper. The billing guidelines, however, permit such charges if the operative procedure itself was "diagnostic" (which requires checking the guidelines' characterization of the procedure in question, and the patient's history to see why the procedure was done), or if the post-operative visit was to treat a "complication" of the surgery, or to treat a new element (again requiring evaluation of the patient's history). *See* Physicians' *Current Procedural Terminology* (4th ed., 1977) at 51.

[5] For example, the CHAMPUS auditor testified that petitioner had improperly billed two insurance companies for the same services when the claim forms alleged to be fraudulent showed the contrary; she accused petitioner of never collecting deductibles, and thus overcharging CHAMPUS, when vouchers used as government exhibits again demonstrated the contrary; she stated that petitioner never billed for less than a "comprehensive" visit when again the exhibit vouchers contradicted her; she stated that petitioner never reported other insurance, and again the exhibit

At trial, the government's evidence on the mail fraud counts was entirely circumstantial, and rested in large part on the testimony of three auditors (from CHAMPUS, Blue Cross and Medicaid). Each auditor testified that he or she disallowed Alexander's claims for laboratory tests, and concluded that such tests were not performed in specific instances because Alexander had recorded the test results in the notes of his examination, and not on a separate lab sheet. C.A. 149, 250, 286. This novel "requirement" of a separate lab sheet—which the auditors themselves were unable to explain (and which had not been required by previous Medicaid and Blue Cross audits accepting Dr. Alexander's method of recording tests)—was imposed, not by insurance regulations or guidelines, but by the "protocol" for Dr. Alexander's audits adopted for this case by the auditors' respective supervisors. C.A. 187-88, 289.

Significantly, the Medicaid and Blue Cross auditors then testified about "peer group" statistical evidence, purporting to compare the petitioner's billing practices with his "peer group", and concluding that Dr. Alexander billed for more of these tests per patient visit than comparable doctors. C.A. 254-55. This evidence was undoubtedly highly persuasive to the jury on the hotly-contested issue of test performance, and the Assistant U.S. Attorney emphasized his reliance on this testimony at the outset of his closing argument.[6] C.A. 977-78. This evidence could not, however, be tested by cross examination. The Medicaid auditor had not done the peer group

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vouchers and claim forms contradicted her. *Cf. e.g.*, C.A. 161-167 with C.A. Exh. Vol. 132, 1142, 1149, 1156; C.A. 155 with C.A. Exh. Vol. 1117-31, 1136-41, 1146-48; C.A. 147 with C.A. Exh. Vol. 1119, 1128, 1147, 1490; C.A. 145 with C.A. Exh. Vol. 1139, 1469a-d.

[6] The only other evidence offered on the mail fraud counts was also circumstantial, and consisted of testimony from some of Alexander's former secretaries concerning their failure to observe him performing tests; testimony concerning supplies; and expert testimony criticizing Alexander's microscope but conceding that it was possible to use the microscope to perform the tests billed.

analysis himself; was not an expert in such analysis or in statistics; could not explain why surgeons and obstetricians were included as "peers" of a gynecologist; had not made available the records reviewed; could not explain how the records were chosen—and yet was permitted to give hearsay testimony as to the results of this "analysis". App. H. The Blue Cross auditor's testimony suffered from similar flaws. C.A. 279-81.

Although petitioner testified at trial and denied the charges, on July 29, 1983 he was found guilty on the thirty mail fraud counts submitted to the jury. A verdict of guilty was also returned on five false claim counts, and the single false statement count. C.A. 1055-57. On November 10, 1983, petitioner's motions for a new trial and additional discovery were denied, and the trial court sentenced him to concurrent thirty-month prison terms and cumulative $500.00 fines on counts 1 and 40, suspended imposition of sentence on the remaining counts and ordered that petitioner be placed on probation for five years at the expiration of his period of incarceration. App. D.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the convictions, "except as remanded for the limited purpose of reconsidering defendant's new trial motion." App. 16a. The Court rejected the argument that the indictment did not give adequate notice of the charges against Dr. Alexander, holding that "any need for further detail could have been supplied by a timely requested bill of particulars." App. 9a. The Court ignored petitioner's argument that admission of testimony concerning the "peer group" studies was error under the Confrontation Clause of the Sixth Amendment, and instead, viewing the issue as one of the trial court's discretion, conclusorily found "no abuse." App. 9a. The Court was troubled by the argument that convictions on some counts had been obtained where there was insufficient evidence as a matter of law to sustain a conviction on one of the theories submitted to the jury,

but based on a "scrutiny" of the record concluded that "the jury here relied upon the supported rather than the arguably unsupported factual theory." App. 9a.[7]

The Court of Appeals ordered a remand under *Brady* v. *Maryland*, 373 U.S. 83 (1963), on the limited issue of whether the government had suppressed results of a Blue Cross patient survey in which patients had voluntarily confirmed that Alexander in fact performed the tests that he had billed to Blue Cross. The Court rejected the government's argument that such information could be exculpatory only if it directly rebutted one of the specific patient claim forms identified at trial as being fraudulent, holding that such evidence "could tend to rebut the Government's proof of a pervasive practice of not performing tests as a circumstantial means of proving guilt of the specific offenses charged," and "could provide credible evidence that Alexander's failure to indicate test results on his office records was not probative that he had not in fact performed them . . ." App. 15a. The Court thus expressly rejected the basis on which the government had evaluated whether the information in its possession was exculpatory. It also found that the government's constantly changing story of what had been produced during discovery had "fatally compromised the integrity of the proceedings on the new trial

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[7] The Court also dismissed the claim that petitioner's conviction on three of the false claim counts was not supported by the evidence, concluding on rehearing that the claims had had a " 'tendency to induce the government to act' " (citing *United States* v. *Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983). 20a. The Court simply did not address the point that, *e.g.*, the claim form in Count 33, which reported that the charge for services had already been paid in full, was in fact not a false claim for payment, since no payment was demanded. Nor did the Court address the point that under *Pruitt*, *supra*, to support a false claim conviction, the government must show a tendency to place "the claimant in a position to receive government benefits." *Id.* The government, however, offered no testimony or evidence showing that improper benefits were considered or paid to Alexander or anyone else.

motion." App. 10a. The Court nevertheless, and inexplicably, refused to require inquiry by the District Court on remand as to what other exculpatory or Jencks Act material in the government's possession had been suppressed either because of the prosecution's misinterpretation of *Brady* or because of its "equivocation" in providing discovery. App. 9a-10a.

In sum, Dr. Alexander went to trial knowing none of the specific facts and circumstances on which the mail fraud counts of the indictment were based. No *Brady* material had been produced, although exculpatory material was in the government's possession. Not one page of grand jury testimony was produced under the Jencks Act (the government having remarkably claimed to the trial court that "there was none in this case because there was no time for it.") C.A. 1094. The Jencks production that did occur one day before trial was incomplete—*e.g.*, conclusory audit reports from the government's three crucial auditor witnesses did not identify the claims audited, although such information had to have been compiled and was essential to preparing a cross-examination of those witnesses. The "peer group" studies were not produced at all.

In a case resting so completely on circumstantial evidence, and consequently particularly vulnerable to an informed attack, the government's unconstitutional failure to specify its charges and to provide adequate discovery made it impossible for the defense to prepare its case before trial. Those errors were compounded at trial when the auditors were permitted to bolster their circumstantial testimony by describing "peer group" studies that the government itself conceded on appeal were hearsay. Br. for United States at 34. Despite those fundamental errors, the Court of Appeals declined to reverse, and on December 11, 1984, denied Alexander's petition for rehearing.

## REASONS FOR GRANTING THE WRIT

### I. The Indictment's Failure to Provide Notice and to Limit the Petit Jury to Charges Returned by the Grand Jury Conflicts With Prior Decisions of This Court and Creates a Conflict within the Circuits

Ever since *The Hoppet* v. *United States*, 11 U.S. (7 Cranch) 389 (1813), this Court has required that an indictment or information must contain the elements of the offense charged *and* must provide the accused with the details of the pattern of conduct prosecuted, so that a defense to the charge can be prepared. Those requirements are summarized in this Court's opinion in *Russell* v. *United States*, 369 U.S. 749, 763-64 and 768 (1962):

> These criteria are first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and secondly, "'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34." *Hagner* v. *United States*, 285 U.S. 427, 431 . . .
>
> [A]n important corollary purpose to be served by the requirement that the indictment set out the "specific offense" . . . is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." [quoting *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875)].

The mail fraud counts in this case (with one exception) contain the bare elements of the offense charged, but they do not provide the notice required by the Fifth and Sixth Amendments. Their complete lack of specificity made it possible for the prosecution to seek petitioner's conviction on facts not found by, and perhaps not

even presented to, the grand jury that indicted him, in violation of *Russell* v. *United States*, 369 U.S. 749 and *Stirone* v. *United States*, 361 U.S. 212 (1960). Unconfined by any specifics in the indictment, the prosecution was free to shift its emphasis and factual presentation at will, creating a moving and unpredictable target for both the defense and the trial court.

Count One illustrates the problem. The indictment did not even allege the insurance provider or amount of the check at issue on that count, although the prosecution did provide to the defense a copy of the check it claimed the grand jury had had in mind. Depending on whether and what evidence was in fact presented to the grand jury concerning that check, the grand jury could have had in mind as fraudulent any one of forty-three patient claim forms or three hundred and fifty-four services billed on those forms. C.A. Exh. Vol. 117-31. At trial the government alleged that the claim for only one of those patients was fraudulent, because the four services billed to CHAMPUS on that claim were not performed, and because Alexander had billed and collected from Blue Cross for some of the same services.[8] None of these specific allegations appear in or can be implied from the language of the indictment, no matter how imaginatively it is read.

The defects of the indictment in this case are underlined by comparing it with the indictment presently before this Court in *United States* v. *Miller*, 715 F.2d 1360 (9th Cir. 1983), *modified* 728 F.2d 1269, *cert. granted*, 105 S.Ct. 78 (1984) (Argued 11/16/85) (No. 83-1750). In *Miller*, another mail fraud case, the defendant was charged with a simple two-part fraudulent scheme in support of the mail fraud alleged—but only one part

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[8] In fact, the exhibits introduced by the government at trial showed that duplicate billing had not occurred. *See* Fourth Circuit opinion, App. 6a-7a.

of that scheme was ultimately submitted to the jury. The question before this Court in *Miller* is whether this explicit narrowing of the scheme at trial, thus departing from the grand jury's charge, required reversal.[9] In this case, by contrast, the defense's surprise at the actual basis for the government's case was so pervasive—and the uncertainty about what the grand jury had actually charged so great—that even when the government's exhibits directly contradicted portions of the fraudulent scheme that the government presented through testimony at trial, neither trial counsel nor the trial court even noticed the problem, much less considered whether an improper "narrowing" of the charges had occurred.[10]

The failure of the indictment in this case to specify the patient claims actually alleged to be fraudulent should not be dismissed simply as an omission of "evidentiary detail" that could have been cured by a bill of particulars. As this Court reasoned in *Russell*, in rejecting a similar argument: "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." That is a particularly vivid possibility in

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[9] Interestingly, even under the government's analysis in *Miller*, asking for reversal and suggesting a limiting construction, *inter alia*, of *Stirone* v. *United States*, 361 U.S. 212, the Fourth Circuit erred in this case. The government in its brief in *Miller* at least recognizes that notice and a defendant's ability to prepare his defense are important parts of an indictment, and states that when notice is at issue, the reviewing court should evaluate whether lack of notice substantially prejudiced the defendant's case. *See* Brief for the United States at 45-46. The Fourth Circuit undertook no such analysis of prejudice in this case.

[10] *See e.g.*, discussion *infra* at 14-15.

this case, where the government has remarkably claimed that *no* testimony was presented to the grand jury.[11]

Even with respect to a simple stolen-property case this Court has recognized: "an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him and the court must be able to decide whether the property taken was such as was the subject of larceny." *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875). The charges in this case were far from the simplicity of a stolen property case, yet any information concerning the charges actually proved by the government at trial was wholly absent from the indictment.

In *United States* v. *Radetsky*, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976), the Tenth Circuit considered the question of indictment sufficiency in a factual setting very similar to the one in this case. In *Radetsky*, the defendant doctor was charged in somewhat general terms with the falsification of services and charges relating to Medicare claims. He argued that the indictment's failure to allege the exact "services" and "charges" claimed to have been fraudulent permitted the government to choose to introduce proof on any of numerous items, whether or not they had been presented to the grand jury.[12] The Court characterized this question

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[11] C.A. 1094. Since that representation was made by government counsel at the argument on defendant's new trial motion in the District Court, the government has claimed in its appellate brief (without record support) that an unidentified summary witness testified before the grand jury. Br. for United States at 37. But two of the audit reports, for Blue Cross and Medicaid, had not even been written at the time the indictment was returned, making it unlikely that the specific claim forms urged by the government at trial to have been fraudulent had even been identified at the time this case was presented to the grand jury.

[12] In contrast to this case, the defendant in *Radetsky* was supplied with a Bill of Particulars before trial, curing the lack of notice that

as "difficult and close, in view of the requirements of the Fifth Amendment guaranty, as applied in *Stirone*, in *Russell* and in similar cases." 535 F.2d at 564. The court ultimately rejected the defendant's argument, even while characterizing the question as "serious and not free from doubt," *id.* at 565, because the indictment did contain important specifics:

> [I]t identifies each of the basic documents—the requests for payment that are relied on as containing the false statements. Their dates and the single individual patients involved are set out together with the period of time covered by each request for payment. The four types of concealment and falsifications charged are specified (by count)—medical services not rendered, by date; medical procedures and services not fully, truly and accurately described ("services"); charges being at a higher rate and more than customary for the same service; and the amounts paid, allegedly inflated above amounts already paid by the patients.

535 F.2d at 564-65.

*None* of the information specifically relied upon by the Tenth Circuit as saving the *Radetsky* indictment from invalidity was provided to petitioner in this case. Going into trial, the government could thus have chosen from among any of six hundred forty-one patient claims and over three thousand patient services covered by the checks identified in the mail fraud counts in order to present its case,[13] and its choice was not trammeled in

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plagued petitioner in this case. The opinion in *Radetsky* is thus concerned exclusively with the pure *"Russell"* question of whether there was a sufficient identification of the facts charged in the indictment to prevent the government from selecting and presenting proof at trial without regard to whether it had been presented to and considered by the grand jury.

[13] The charges actually put in issue as improper under the government's proof for the entire indictment amounted to well under

any way by what facts the grand jury actually considered in returning the indictment.

The types of prejudice suffered by petitioner as a result of leaving the government free to pick and choose its case without concern for what the grand jury found can be illustrated by counts one through four. With respect to the four patient claim forms identified at trial as at issue in those counts two main theories of fraud were alleged: 1) that Dr. Alexander had improperly sought to receive duplicate payments from both CHAMPUS and Blue Cross for the same services; and 2) that Dr. Alexander had not provided the services claimed. With respect to the first theory, the claim forms themselves demonstrated that duplicate payments had not been made. *See* Court of Appeals' Opinion, App. 6a-7a. Not knowing beforehand what fraud was alleged or even what patient's care was at issue, neither petitioner's trial counsel nor the court noticed that the claim forms themselves were inconsistent with the government's theory. As a result, the government's witnesses were not cross-examined on this issue, and the trial court did not even have an opportunity to consider withdrawing this theory of fraud from the jury's consideration.[14] Thus neither *Russell's* primary nor corollary purposes for specificity of an indictment were met: the defendant did not have notice of what he had to be prepared to meet, and could not be sure that the charges at trial had even been considered by the grand jury; and the trial court itself lacked adequate information to supervise the trial "intelligently," and to recognize whether the facts alleged

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$3000. Put another way, only five percent of the total dollar amount of the checks alleged in the mail fraud counts was actually challenged as unlawful by the government's proof at trial.

[14] And of course—assuming that the grand jury heard any evidence on these counts—the inadequate duplicative billing theory may have been the theory on which the grand jury indicted.

sufficed to support a conviction. *Russell* v. *United States*, 369 U.S. at 768-769 and n.15.[15]

Although rules about the sufficiency of indictments are well established in theory, their applicability should be addressed and affirmed by this Court in the context of a case reflecting the complexity of modern prosecutions under such widely used charging statutes as 18 U.S.C. § 1341. In this case, despite the general verbiage of a forty-count indictment, the petitioner in fact went to trial under a "cryptic form of indictment" that left "the chief issue" for each mail fraud count "undefined." *Russell* v. *United States*, 369 U.S. at 766. The prosecution was as a result free to shift its theory of criminality with "each passing vicissitude of the trial and appeal," with no assurance that the facts on which petitioner was convicted were "even presented to the grand jury." *Id.* at 768, 770. By granting *certiorari* in *United States* v. *Miller*, 105 S.Ct. 78, this Court has already recognized the importance of clarifying the relationship between indictment and proof at trial. This case will permit the

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[15] With respect to Counts 1-4, the Court of Appeals assumed without deciding that conviction on the "duplicate billing" theory would have been error, but conducted a retrospective scrutiny of the record to conclude, by looking to the jury's decisions on other counts, that the jury convicted on the "nonperformance of tests" theory. This effort to appraise what the jury would have done is always risky. *See, e.g., Haupt* v. *United States*, 330 U.S. 631, 641 and n.1 (1947). Here the effort was doomed from the outset because, just as with the trial court, the Court of Appeals' review was undermined by *its* confusion as to what the indictment charged. The Court looked first to other CHAMPUS mail fraud counts where a conviction had been obtained, saying that those counts rested only on a "nonperformed test" theory, when in fact the evidence in support of most of those counts also rested on a "duplicate billing" theory. And in seeking to tease out which of the "two" fraudulent theories the jury relied on, the Court completely lost track of the fact that the indictment alleged eight separate theories of fraud, any one of which—depending on the government's theory at trial and not on what the grand jury decided—could have been seized upon by the petit jury with respect to a specific count.

Court to complete that clarification process, but in a context where the costs to the fact-finding process of failing to enforce the applicable Fifth and Sixth Amendment guarantees of indictment specificity are unmistakable.

### II. Admission of Non-Expert Hearsay Testimony in Violation of the Confrontation Clause Conflicts with Prior Decisions of this Court

The Confrontation Clause of the Sixth Amendment restricts the range of admissible hearsay in two ways:

> [T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant . . . Once a witness is shown to be unavailable . . . the Clause countenances only hearsay . . . that bear[s] adequate . . . 'indicia of reliability' . . .
>
> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

*Ohio* v. *Roberts* 448 U.S. 56, 65-66 (1980).

These principles were simply ignored by the trial court and by the Fourth Circuit. Mr. Halloran, the Medicaid auditor who testified at trial,[16] was permitted

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[16] Mr. Halloran was simply identified at trial as an Investigation Supervisor with Virginia Medicaid who had examined one hundred and seventy-four of petitioner's Medicaid records. C.A. 247-48. He was not proffered as an expert witness and had had no formal medical training. C.A. 268. He nevertheless was permitted to testify, not only about the peer group study described above, but also to give in effect a medical opinion in support of his testimony on all the Medicaid mail fraud counts that pregnancy tests on "sterilized" patients were improper and unnecessary—even though such tests, *e.g.*, on patients with tubal ligations are in fact required by the applicable standard of medical care, which recognizes that ligations do not always accomplish the intended results of preventing pregnancy. Cf. C.A. 249, 257 with C.A. 724-26.

to testify about the results of a "peer group" study he did not perform and could not explain. Nor could he identify who it was who had prepared the study. App. 58a. There was certainly no showing by the government either that the author(s) of the study were unavailable or that their study bore "indicia of reliability" that would bring it within a recognized hearsay exception. Neither the study nor the records on which it was based were proffered as exhibits or even offered for inspection to petitioner's trial counsel. C.A. 196. The result was that petitioner's counsel had no information to use in his effort to cross examine Mr. Halloran, and the blindfolded efforts he could make were ineffectual, because Mr. Halloran responded to challenges by taking refuge alternately in the fact that he had not performed the study, or by volunteering "explanations" that he was unqualified to give. App. H.

The petitioner's inability to effectively challenge the "peer group" study unquestionably and profoundly damaged his case. The jury could not have helped but weigh heavily the "fact" it purportedly established—that Alexander billed for many more tests of a certain kind than his "peers." The problem was that the selection of these peers, and the judgment of comparability implied by that selection, was highly suspect. There is no reason to expect, for example, that general surgeons—who treat men, women and children for a variety of surgical problems—would use the same battery of tests as a practicing gynecologist such as Dr. Alexander. Indeed, Mr. Halloran testified, when asked about the surprising inclusion of surgeons in the "peer group", "I can't explain why surgeons are in it any more than you can, sir." App. 58a. Many doctors use outside laboratories for testing and do not themselves bill patients for the tests ordered—thus seriously distorting the comparison with Dr. Alexander, who performed and billed his own tests. When confronted with that issue, with respect to surgeons (whose

tests are often conducted in a hospital, and billed separately), Mr. Halloran stated that Alexander's hospital patients "would offset" the surgeons' patients "from a statistical standpoint"—even though Mr. Halloran clearly had not made such a statistical comparison and was not in fact qualified to make such comparisons. App. 58a-59a.

There are many other questions casting doubt on the validity of the "peer group" study that could have been asked if Halloran had known anything about the study, and if petitioner's counsel had had the study and underlying documents in hand. Why were obstetricians included when Alexander's practice was almost entirely gynecology? Didn't the laboratory tests differ for the two types of practices? Did other gynecologists substitute and bill for comparable but more sophisticated laboratory tests than the ones performed in petitioner's office? Was there any effort to compare the type of gynecological practices at issues? (In a predominantly young patient practice as was Alexander's, for example pregnancy tests are necessary more frequently than in an older patient practice.) Were the surgeon's male and child patients excluded from the statistical base? Was there *any* effort to make this "peer group study" in fact comparable to Dr. Alexander's practice?

The questions that could have been posed with respect to Mr. Halloran's "study" apply equally to the Blue Cross auditor's "peer group" study. Mrs. Crumpler at least testified that she looked at the records herself, but again the records were not admitted into evidence or offered for inspection by defense counsel. C.A. 280. Thus her testimony about the contents of the records was hearsay, absent an exception permitting its admission. Contents of numerous documents are often testified to by a summary witness—but such testimony can be admitted only when the underlying documents are themselves admitted into evidence. *See, e.g., Gordon* v. *United States*, 438 F.2d 858, 876 (5th Cir.), *cert. denied*, 404 U.S. 828

(1971). The only other possible justification was that Mrs. Crumpler was testifying as an expert witness, concerning evidence "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 703, Fed. R. Evid. But Mrs. Crumpler was not qualified as an expert in this area;[17] nor was there any basis in her testimony for finding that the data she used was of a type "reasonably relied upon" by experts to form opinions concerning comparability. *See also United States* v. *Lawson*, 653 F.2d 299, 302 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982), emphasizing that in addition to the showing of "reasonable reliance" required by Rule 703, the defendant must also have access to the hearsay information relied upon by the expert witness so that effective cross examination is possible.[18]

In its brief below, the government conceded that at least Mr. Halloran's testimony was hearsay (Br. for United States at 34), but urged that its admission was not plain error. The Court of Appeals brushed the problem aside with no analysis by finding the trial court had not abused its discretion in admitting this testimony. App. at 5a, n.6. The trial court does not, however, have "discretion" to ignore the requirements of the Confrontation Clause. To the contrary, under this Court's decisions, once "petitioner has been denied the right of effective cross-examination," no specific showing of prejudice is required, because this is "constitutional error of the first

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[17] Mrs. Crumpler testified simply that she was a health care analyst for Blue Cross/Blue Shield of Virginia. She was not proffered or qualified as an expert witness under Rule 702, Fed. R. Evid. C.A. 277.

[18] The *Lawson* court also relied on the Advisory Committee note to Rule 705, that it "assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination." Here neither the "peer group study" nor the underlying records were turned over to the defense at any point during the trial.

magnitude and no amount of showing of want of prejudice would cure it." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974), quoted in *United States* v. *Cronic*, 104 S.Ct. 2039, 2047 (1984).

There is simply no question on this record that petitioner's right to confront witnesses was ignored and improper testimony was permitted on a point that was central to the government's circumstantial case against him. This Court should intervene to correct this error, not only because petitioner's case was irretrievably prejudiced, but to establish that Confrontation Clause errors of this magnitude require more from trial and appellate courts than casual dismissal. This Court, which originally promulgated the Federal Rules of Evidence, should ensure that the Rules' studied liberalization of provisions allowing expert witnesses to utilize hearsay is not carried over into allowing use of hearsay by lay witnesses at criminal trials, in violation of defendants' rights under the Confrontation Clause.

### III. The Government's Demonstrated Incorrect Interpretation of Brady v. Maryland Requires Re-evaluation of Its Evidence Under a Correct Standard

The majority of the Fourth Circuit's opinion in this case deals with its displeasure with the government's representations concerning potentially exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963). As described in the foregoing statement of the case, the Court remanded to the District Court for further inquiry on the government's apparent failure to turn over approximately 50 patient surveys sent out by Blue Cross prior to the investigation leading to the indictment in this case, in which many of the patients queried confirmed Dr. Alexander's performance of tests.

In so doing, the Court rejected the narrow standard purportedly used by the government to evaluate exculpatory evidence, and explicitly held instead that reports

from patients that confirmed Alexander's performance of tests were potentially exculpatory under *Brady*, given the government's theory of the case, even if those patients' claim forms were not specifically challenged by the government at trial. App. 14a-15a. And the Court remanded for further investigation of whether that Blue Cross patient survey (whose existence and positive results defendant discovered because of a brief allusion to it in a government report) was in fact turned over to the defense before trial. Further investigation on that point was necessary because the government had changed its story at least five times in responding to inquiries concerning defense access to the Blue Cross survey—including flatly assuring the trial court at argument on the new trial motion that the materials had been available for inspection, and then flatly telling the Court of Appeals at oral argument that they had not been in the government's possession at all. App. at 12a-14a.

The record briefly described above demonstrates two things: 1) that the government erred by using the wrong standard to evaluate whether evidence in its possession was exculpatory; [19] and 2) that in originally refusing further inquiry at the new trial motion argument on *Brady* and Jencks Act issues,[20] the District Court's reliance on the Assistant U.S. Attorney's representations concerning what discovery had occurred had been misplaced. In-

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[19] These Blue Cross materials had been specifically requested. C.A. 58C-E. In violation of the rule established in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), however, the prosecution failed to respond "either by furnishing the information or by submitting the problem to the trial judge. When the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, inexcusable."

[20] The Jencks Act, 18 U.S.C. § 3500, and Rule 26.2, Fed. R. Crim. Pro., govern the production of witness statements at trial.

The Fourth Circuit expressly recognized that the trial court cut short its inquiry on the *Brady* claim because of its reliance on "the statement of the United States attorney." App. 12a, n.9.

stead, however, of remanding to the District Court with directions to evaluate all of the discovery issues raised by petitioner's new trial motion, the Fourth Circuit limited the remand to the Blue Cross patient surveys, where the defendant could *prove* that the government had exculpatory evidence in its possession that had apparently not been disclosed.

This limitation simply does not make sense. There is no doubt that the government has investigatory material in its hands (such as interview notes and memoranda) that were never disclosed to the petitioner, and as to which the government clearly applied the wrong standard in evaluating *Brady* issues. It is also clear from the Court of Appeals opinion that the government's own representations concerning what was available for discovery in the first place cannot be trusted.[21]

It is further clear that the government's performance under the Jencks Act demands further scrutiny. Not one page of grand jury testimony was produced pursuant to

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[21] The suppression of the Blue Cross patient survey was not the only *Brady* error identified by the petitioner below. Although he had specifically requested before trial the criminal records, pending criminal charges and reasons for cooperation with the government of prospective government witnesses, the extensive criminal record (and pending charges) of one of the government's principal witnesses, Ms. Rogowski—a former secretary whose testimony had special weight because, unlike other former employees, she had spent months, instead of a few days or weeks, in Dr. Alexander's employ—was suppressed. C.A. App. 1097 and C.A. Exh. Vol. 1632-46. The petitioner was therefore denied the ability to impeach this witness by evidence of conviction of crime (Rule 608, Fed. R. Evid.) or to inquire into bias (*United States* v. *Abel*, 105 S.Ct. 465 (1984).) Without this information, petitioner was denied the right to effective cross-examination that prior decisions of this Court in similar circumstances guarantee. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974), relying on *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Alford* v. *United States*, 282 U.S. 687 (1931). Despite this clear precedent, the Court of Appeals found no error. App. 10a.

the Jencks Act—a state of the record that would make sense only if the grand jury had in fact improperly returned an indictment without hearing any testimony, as the government has claimed. C.A. 1094. Recently the government has informally suggested that Agent Powell (who was a government trial witness) may have testified as a summary witness before the grand jury [22]—but none of his grand jury testimony was produced. Although very brief audit reports of the three auditors were produced as Jencks material, the claims actually audited were not identified, and none of the work papers or other written evaluations of the auditors was produced, although it would have been impossible to audit hundreds of patient claims without recording the results somewhere. Nor was Mrs. Crumpler's "peer group study" produced. All of this putative Jencks material could have served to undermine the credibility of the government's witnesses and to provide exculpatory information for use upon their cross-examination.

The Court of Appeals' refusal to require inquiry by the District Court into these failures is on these facts irrational. It found that the government erred in its appraisal of exculpatory evidence and that it could not trust the government's description of the discovery process. There is simply no basis on this record for confidence that these kinds of errors did not result in the suppression of additional exulpatory evidence to which the defendant was entitled. This Court should grant review in order to consider whether once the government is shown on the record to have applied an improper interpretation of *Brady* v. *Maryland*, the government is then required to re-evaluate all of its evidence under the correct standard.

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[22] Conversation with Assistant U.S. Attorney Bradenham (2/21/85, with Judith Miller).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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March 11, 1985

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 83-5283

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UNITED STATES OF AMERICA,
*Appellee,*

versus

PETER V. ALEXANDER,
*Appellant.*

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge. (CR 83-86-N)

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Argued June 8, 1984. Decided October 22, 1984

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Before WINTER, Chief Judge, PHILLIPS, Circuit Judge and BUTZNER, Senior Circuit Judge.

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Judith A. Miller (Brendan V. Sullivan, Jr.; Harold Ungar; and Williams & Connolly on brief) for Appellant; Janis Kockritz, Attorney, Department of Justice (Elsie L. Munsell, United States Attorney, Tommy E. Miller, Assistant United States Attorney, on brief) for Appellee.

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PHILLIPS, Circuit Judge:

Dr. Peter V. Alexander appeals from multiple convictions for mail fraud, 18 U.S.C. § 1341, submission of a false claim, 18 U.S.C. § 287, and making a materially false statement, 42 U.S.C. § 1396k in connection with the submission of medical insurance claims. We remand the case for reconsideration of the defendant's motion for new trial on the grounds of failure by the Government to produce *Brady* materials, and for such further proceedings as may then be warranted. Subject to that reconsideration, we affirm the convictions.

## I

At relevant times, Dr. Alexander operated a medical practice in Virginia Beach, Virginia, specializing in gynecology and obstetrics. The charges against Dr. Alexander arose out of his dealings with three major health insurers: (1) the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); (2) Medicaid; and (3) Blue Cross/Blue Shield. In essence, the indictment alleges that, between May 15, 1978, and December 7, 1982, Alexander perpetrated a fraudulent scheme on these insurers which involved the following eight different "parts": (a) submitting duplicate claims for the same services to more than one insurer; (b) using the Current Procedural Terminology (CPT) codes to submit false claims to all three; (c) falsely claiming that certain services had been performed when in fact they had not been; (d) claiming to have performed pregnancy tests on women he knew to have been sterilized; (e) falsely claiming to have diagnosed illness in connection with routine office visits not compensable by CHAMPUS or Medicaid without such a diagnosis; (f) claiming higher fees from insured patients than from cash-paying patients; (g) falsely claiming to have rendered higher-compensation "comprehensive" service when he had actually rendered "brief" or "intermediate" service; and (h) claiming pay-

ment for post-operative office visits by surgery patients even though such visits were to be subsumed in the claim for the surgery itself.

Alexander was charged with thirty-one counts of perpetrating this fraudulent scheme by use of the mails, Counts 1-31; eight counts of submitting a false claim to an agency of the United States, Counts 32-39; and one count of making a materially false statement in an application for Medicaid assistance benefits, Count 40. At the close of the Government's case-in-chief, the district court dismissed Count 27, a mail fraud count, on the Government's request. The jury then returned verdicts of guilty on the remaining thirty mail fraud counts, Counts 1-26 and 28-31, five false claim counts, Counts 32-34, 36 and 39, and the single false statement count, that is, Count 40. Alexander moved for a new trial, raising many of the objections now advanced on appeal. Accompanying the new trial motion was a motion for additional discovery, about which more will later be said. The court denied both motions and sentenced Alexander to concurrent thirty-month prison terms and cumulative $500.00 fines on counts 1 and 40, suspended imposition of sentence on the remaining counts, and ordered that the defendant be placed on probation for five years at the expiration of his period of incarceration. This appeal followed.

## II

Alexander first argues that the evidence was insufficient to support the jury's verdict of guilty on mail fraud counts 1-4 and false statement counts 32-34 respectively. Because of the dispositive consequences of this contention were it to be upheld, we address it first and, in the end, reject it as to all these counts.

### A

Counts 1-4 charged Alexander with use of the mails to defraud CHAMPUS by perpetrating, in violation of 18

U.S.C. § 1341,[1] the eight-part scheme previously outlined. The Government's prosecution of these counts proceeded on two alternative factual theories of guilt: (1) Alexander had fraudulently submitted to CHAMPUS insurance forms which claimed reimbursement for laboratory tests which were not in fact performed and (2) he had submitted claims which falsely indicated that the patient had no other medical insurance.[2]

The record amply supports finding of guilt based on the first, "non-performed tests," theory. Gloria V. Galanda, a CHAMPUS auditor who was one of the Government's principal witnesses, testified that although the CHAMPUS insurance forms submitted by Alexander claimed reimbursement for a number of tests performed for each of the parties involved,[3] his office records failed to indicate any results derived from these tests.[4] Furthermore, the Government's evidence suggested that Alexander's failure to perform tests for which benefits were claimed was a consistent and pervasive pattern in his practice.[5]

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[1] 18 U.S.C. § 1341 prohibits the use of the mails for the purpose of executing a "scheme of artifice to defraud" or "for obtaining money or property by means of false or fraudulent . . . representations."

[2] Counts 1-4 involved claims for services rendered to two different patients on four separate occasions: Margaret Adamson, Counts 1, 2 and 4, and Helen Smith, Count 3.

[3] As was his apparent custom, Alexander claimed that he had performed three tests, urinalysis, wet and dry mount, and smear primary source gram stain on each occasion. A pregnancy test was allegedly performed for Ms. Smith.

[4] According to Galanda, CHAMPUS required documentation outside the patient interview records to support the claim that a test had been performed. While certain notations on Alexander's records arguably indicate that negative results had, in fact, been recorded, the Government's evidence sufficiently put actual performance in issue to support a contrary finding.

[5] Galanda testified that of the 732 insurance forms submitted, claiming reimbursement for 2938 routine laboratory tests, only one test result was recorded in his office records.

A number of Alexander's medical secretaries testified that although they routinely collected and labelled urine specimens, Alexander never tested the samples but directed that they be discarded at the day's end. They also indicated that Alexander rarely reordered supplies. They claimed never to have seen Alexander performing microscopic analysis although he was seen with a slide in his hand on a number of occasions. The only pregnanacy test materials seen in Alexander's office by a number of these secretaries were samples from pharmaceutical companies.

Alexander's business records indicated that he routinely tested all of his patients with the same battery of tests. Mrs. Galanda testified to random samples from Alexander's patient records which indicated that in the majority of cases Alexander routinely billed in *all* cases for urinalysis, wet and dry mount, and smear primary source stain. A substantial number of these billings also claimed reimbursement for pregnancy tests. According to a Blue Cross/Blue Shield "peer-group" analysis prepared and presented in evidence by witness Crumpler, Alexander ranked first among Tidewater-area gynecologists in performing urinalysis, pregnancy and "dry mount" smear tests and second highest for performing "wet mount" tests. Charles Halloran, a Medicaid investigator, compiled and presented in evidence similiar peer group data obtaining comparable results.[6]

The combined effect of this evidence, construed in the light most favorable to the Government, sufficed to allow a rational factfinder to find Alexander guilty beyond a reasonable doubt on the "non-performed tests" theory of guilt, *Glasser v. United States*, 315 U.S. 60 (1942), and we so hold.

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[6] Alexander urges that the district court abused its discretion in admitting these studies into evidence, both because of their irrelevance to the counts charged and because of the inability of the witnesses offering them to answer pertinent questions on cross-examination. We find no abuse.

B

Whether the evidence also sufficed to support a conviction on the second, "no other insurance," theory is more problematic. For while the evidence undoubtedly supports a finding that in respect of each of the counts under challenge, Alexander submitted insurance forms, falsely disclaiming the existence of "other insurance," it does not as clearly support a finding of the requisite intent to defraud or to obtain "*money or property*" by means of false statements.

An example illustrates this difficulty. Count 1 alleged that Alexander had submitted to CHAMPUS, on behalf of Margaret Adamson, a claim for $64.00 for services performed on August 1, 1980. This total included claims for an office visit, $50.00, and three tests, billed at $5.00, $5.00 and $4.00 respectively. The claim form indicated that Adamson had no other insurance. In consequence, CHAMPUS paid $48.00 of the claim. Adamson was, in fact, also insured by Blue Cross/Blue Shield, which was "primary" to CHAMPUS in the sense that CHAMPUS required beneficiaries insured by both insurers to exhaust available Blue Cross resources before receiving payments from CHAMPUS. Blue Cross business records indicated, in fact, that Alexander had filed a claim for Adamson's August 1, 1980, visit, but had charged $25.00, $15.00 and $10.00 respectively for the same tests. Blue Cross had allowed $20.00, $10.00 and $6.00 for these tests, leaving unpaid balances of $5.00, $5.00 and $4.00, which were the exact amounts later billed to CHAMPUS.[7] Blue Cross was not billed for the $50.00 office visit fee, but such amounts were not insured under its policy. Whatever the misstatement concerning other insurance then, CHAMPUS was asked only for amounts for which it was primarily liable. Since billing in this manner could not have had

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[7] This pattern is repeated in the evidence on Count 2 and arguably on Count 3.

the effect of "defrauding" CHAMPUS or of obtaining from it "money" by false representations but would have deprived it only of information, the evidence, it is argued, fails to establish the requisite intent.

We need not, and do not, decide whether that argument has merit. Assuming the evidence is insufficient to support conviction on the second alternative factual theory of guilt, the verdict is nonetheless supportable because of the sufficiency of the evidence on the first. Though under some circumstances a general verdict may so obscure the basis upon which a jury considering alternative theories found guilt that due process will not permit upholding a verdict possibly based upon the unsupported policy, *see, e.g., Stromberg v. California*, 283 U.S. 359 (1931); *United States v. Head*, 641 F.2d 174, 178-79 (4th Cir. 1981), the verdict here may be upheld on the saving principle that by careful record scrutiny it is possible to ascertain with a high degree of probability that the jury here did not rely upon the arguably unsupported theory. *See, Turner v. United States*, 396 U.S. 398 (1970); *United States v. Jacobs*, 475 F.2d 270 (2d Cir. 1973); *see also United States v. Tresvant*, 677 F.2d 1018, 1023-24 (4th Cir. 1982) (concurring opinion).

For several reasons, we are satisfied from the record that the jury here relied upon the supported rather than the arguably unsupported factual theory. Most critically, the jury's verdicts on the mail fraud counts, when assessed in relation to the evidence adduced at trial, do not vary depending upon whether the evidence showed that the patients involved did or did not have other insurance not disclosed on Alexander's claim forms. Thus, while the jury convicted on Counts 1-5, 8 and 11, in which the Government's evidence indicated that the patients involved had other insurance contrary to the disclosures on the respective claim forms, it also convicted on Counts 6, 7 and 9, in which the claim forms either made no statement concerning other insurance or correctly indicated that the patient had none.

Additionally, the jury's failure to convict on Counts 37 and 38, is telling. In each of these counts, there was some evidence to suggest that Alexander might have performed the tests, but the evidence of false concealment of other insurance varied. In both counts Alexander's records indicated that a pap smear was performed by an outside laboratory and results were recorded. In Count 37, the Government presented evidence indicating that the claim form falsely denied the existence of other insurance; no such evidence was introduced on Count 38.

We conclude that the record sufficiently indicates that the jury rested verdict on the first, evidentiarily supported theory so that even if the evidence in support of the second were insufficient to support conviction—a question we need not decide—this would not require reversal.

C

The contention that the evidence was insufficient to support conviction on false statement counts 32-34 is patently without merit. These counts charged false statements with respect to the existence of other insurance. The evidence indisputably showed that Alexander misstated that fact on each claim; his defense was only that this resulted from carelessness in "checking the wrong box." The jury heard the evidence and simply rejected this theory, concluding instead, as it rationally could, that the misstatement was intentionally a false one.

D

We therefore hold that the convictions on Counts 1-4 and 32-34 are supported by sufficient evidence under the *Glasser* standard.

III

We have considered other trial errors assigned by defendant as the basis for reversal or remand for new trial and conclude that none merits relief from the convictions.

First, Alexander contends that Count 1 of the indictment fails to charge a critical element of the crime, but we believe that the indictment sufficiently charged Alexander with a fraudulent use of the mails in violation of 18 U.S.C. § 1341. Second, we reject the contention that the indictment as a whole did not give adequate notice of the charges against Alexander; any need for further detail could have been supplied by a timely-requested bill of particulars. The instructions to the jury concerning the credibility of witnesses are, taken as a whole, neither erroneous nor, assuming error, prejudicial. Finally, in connection with defendant's claim of ineffectiveness of counsel, we simply observe that that claim is more properly considered in Alexander's pending motion in the district court for relief under 28 U.S.C. § 2255, and we express no opinion upon it.[8]

## IV

Among the grounds for new trial unsuccessfully urged by Alexander in the district court was the Government's alleged failure to produce requested exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976). The district court's denial of that motion is now assigned as error.

We conclude that the Government's equivocation in making critical factual representations to defense counsel and to the district court concerning its possession of certain of

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[8] We observe only that the merits of Alexander's claim that his trial counsel was ineffective in failing to procure *Brady* materials is inextricably bound up with the merits of his claim of entitlement to a new trial because of a *Brady* violation by the Government in respect to the same materials, a claim that we remand for possible reconsideration by the district court. *See* Part IV *infra*. The district court may find it possible to consider the two in conjunction, and, in any event, must accommodate its consideration of the common issues raised in the two claims.

the requested materials fatally compromised the integrity of the proceedings on the new trial motion. In consequence the court's resulting order was tainted and cannot stand on the present record. Because the equivocation was only revealed on this appeal, we have concluded to remand to the district court for reconsideration of the motion in light of the circumstances now revealed and for such further proceedings as may then be indicated. Our reasons are as follows.

Our concern runs to only one of several sets of materials claimed by Alexander to have been withheld in violation of *Brady*. As to the others, we conclude that the district court did not err in finding no constitutional or statutory violation and that its order denying new trial is not otherwise tainted in respect of those materials. We therefore do not discuss them in detail.

The critical materials are a 1981 Blue Cross/Blue Shield subscriber survey of patients for whom Alexander claimed to have performed services, including most critically patient responses to questions concerning whether services for which Alexander had submitted insurance claims had actually been performed. We summarize the critical developments that have now been revealed respecting these materials, including important events in the process by which the revelation has occurred.

When Alexander made his pre-trial discovery request on May 31, 1983, he knew in general of the existence of the Blue Cross patient survey. Among the materials requested in his motion were all documents "which refer or relate to the claim forms of Blue Cross/Blue Shield . . . ."

At the time this request was received by the Government, the Government had in its possession critical elements of this survey, including the responses of 48 patients for whom Alexander had claimed to have performed services. This is revealed by an investigative agent's case

summary earlier prepared in anticipation of possible indictment and prosecution. This summary indicated that the survey results had been turned over to the Government investigators by Blue Cross and, most critically, that thirteen of the forty-eight patients contacted had reported that they did not receive all the services for which Alexander had submitted claims and, by implication, that the remaining thirty-five reported that they had received the services. The summary itself did not reveal the names of the patients in either category, making it impossible to match specific patients surveyed with any specifically identified in the indictment as patients in respect of whom Alexander had made allegedly fraudulent or false claims.

In response to Alexander's discovery request the Government did not produce any materials but instead allowed an open-file discovery by Alexander's trial counsel on June 13, 1983. Whether the patient survey results were in the Government files then made available for inspection is a critical factual question that, for reasons that will appear, is only now revealed to be a fairly disputable, and possibly dispositive, one respecting the claimed *Brady* violation.

The investigative case summary itself was later turned over to the defense on the eve of trial as *Jencks* material. As indicated, it would only have revealed that the survey had been made and that its specific results, as summarily reported, were known to the Government and were possibly in its possession in documentary form. The trial was therefore conducted with the Government in possession of the survey results, including the responses of individual patients to the inquiry about services, but with Alexander unaware of those responses, unless they were in the open files made available for inspection, a matter, as indicated, that is now shown to be disputable on the present record.

Following Alexander's conviction, his new counsel sought, incident to a new trial motion, to discover the

identity and the specific responses of the forty-eight patients included in the Blue Cross survey. Voluntary disclosure was first sought from the Government and, when that was refused, a motion for discovery was made. The discovery motion was denied and the new trial motion was therefore heard with defense counsel still unaware, as was the district court, of whether any of the patients surveyed were among those identified in specific counts of the indictment and also unaware of the specific responses of any of those surveyed.

It was at this point that the bothersome course of equivocation by the Government began. Before the hearing, the Assistant United States Attorney gave both defense counsel and his own supervisor to understand that the Government's position was that the survey results had not been, and presumably were not then, in the Government's possession. At the oral hearing on the motion, however, the same Government attorney, responding, he later said, to advice given him by Government investigative agents, changed his position and represented to the district court that the materials had indeed been in the Government's possession, but that they were in the Government files opened for defense counsel's pre-trial inspection. On the basis of that advice—which defense counsel plausibly now contends it was unprepared to dispute in view of the Government's pre-hearing representation—the district court rejected the *Brady* objection as grounds for a new trial.[9]

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[9] The district court flatly rested rejection of the *Brady* claim upon the factual representation by Government trial counsel:

> The *Brady* material that [defense counsel] thinks may not have been furnished, I have the statement of the United States Attorney that this was literally an open file case and that the defendant himself and his attorney were given the records which [defense counsel] now complains of, and were allowed to go over them at their convenience.

Following this unanticipated change of Government position, and with this appeal pending, new defense counsel obtained from Alexander's trial counsel an affidavit stating that he did not recall seeing the survey responses or related audit items in the open file inspection he conducted. On the basis of that affidavit, defense counsel unsuccessfully sought from this court a "partial remand" to the district court to inquire into the facts of the open file inspection, both as incident to reconsideration of its new trial motion and in connection with a 28 U.S.C. § 2255 claim of ineffective assistance of trial counsel. *See* Part III *supra.*

When the appeal came on for oral argument in this court, the Government's equivocation on the matter continued. In response to a direct question from this court, the same Government trial counsel flatly represented that the survey materials were, at the critical times, in the possession of Blue Cross and that he had not seen them. This of course reverted to the position represented to defense counsel before the new trial hearing in district court, a position subsequently reversed at that hearing.

This position was once again reversed by Government counsel in response to a court-requested post-argument defense memorandum that appended the investigative case summary showing Government possession of the survey materials by acquisition from Blue Cross. The Government's letter response to this memorandum simply indicated that once again Government counsel had inadvertently misstated the position and that once again Government investigative agents had corrected Government counsel's recollection and recalled for him that the materials were in fact in the Government's possession. This time, however, the Government's position as to whether the materials' were in fact in the open files was itself stated with a new degree of equivocation. Rather than a flat statement that they *were* in the open files at

the time of the inspection,[10] the Government now only asserted that open file discovery was permitted and that, in addition, the Government had "instructed its investigative agents to bring whatever additional materials they had gleaned from Blue Cross."

From this regrettable course of proceedings, we can only conclude that whether the survey materials were actually produced by the open file inspection is a disputable question of fact that, because of the Government's conduct, was not fairly presented as such to the district court. If resolution of that factual question is required to resolve the *Brady* claim, defendant is now entitled to have it determined by the district court in a hearing appropriate to the factual inquiry.

The question remains, however, whether its resolution is required for that purpose. The Government contends that the defendant has not, in any event, made the requisite showing that the materials were required to be produced under the *Brady-Agurs* test. The short answer, as defendant points out, is that neither the defendant, nor this court, nor the district court could properly address that question without inspecting the survey responses and related Blue Cross audit materials that the Government now presumably concedes it has had in its possession all along.

It may well be that upon inspection the lack of *Brady-Agurs* relevance asserted by the Government will readily appear. But the defendant plausibly shows how exculpatory relevance *might* appear, depending upon the contents of the materials and upon whether the original discovery request specifically or only generally identified these materials.[11] *See Agurs*, 427 U.S. at 112. First, the patient

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[10] The fact flatly represented to the district court at the hearing there on the motion for new trial. *See* note 9 *supra*.

[11] The Government's contentions in a post-argument reply memorandum that the charges against Alexander related so marginally to conduct involving Blue Cross that the materials could not on that

responses—thirty-five of which presumably indicated that services were performed—could tend to rebut the Government's proof of a pervasive practice of not performing tests as a circumstantial means of proving guilt of the specific offenses charged. Second, they could provide credible evidence that Alexander's failure to indicate test results on his office records was not probative that he had not in fact performed them, another facet of the Government's theory of prosecution. Finally, there could be among the thirty-five patients who presumably reported services performed some specifically identified in the indictment as not having received the services claimed.[12]

We of course do not now hold that if any of these possibilities are revealed, they dictate a finding of a *Brady* violation. That is a judgment for the district court to make based upon the record as a whole. We simply cite them as indicating the defendant's entitlement to dis-

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account be material under *Brady* is disingenuous at best. A critical feature of the theory of prosecution—a feature in fact incorporated in each of the thirty-one mail fraud counts—was that the specific offenses charged in these counts were part of an overall scheme that included the submission of over $20,000 in false claims to Blue Cross. The Government's supporting statement that only two Blue Cross patients and four Blue Cross counts were involved is, for that reason, misleading at best. The extent of this material's *Brady* materiality can only be assessed by looking to its content.

[12] This possibility is indeed given some color on the present record. Following Alexander's conviction, the patient identified in Count 34 as one falsely stated by Alexander not to have other insurance revealed to Alexander's counsel that Alexander had indeed performed the services for which he made claim and that this fact had been reported on this patient's survey response. On trial the Government's witness, Galanda, had testified that not only had Alexander misstated the fact of other insurance coverage in respect of this patient but in fact had never performed the services reported. While this was not a "non-performance" count, so that the charge itself is not directly refuted by this patient's assertion, the possibility that among the other responses direct refutation might be found is underscored. The Government's witness indisputably testified to a fact refuted by this patient's response.

closure of the survey materials in order properly to press his *Brady* claim as a basis for new trial if, having inspected them, he concludes so to proceed.

We therefore vacate the district court's order denying new trial, and remand for its reconsideration in accordance with this opinion. Preliminarily, the Government should be ordered by the district court to produce for defendant's inspection all materials in the Government's possession at the time of defendant's pre-trial motion for discovery that related in any way to the Blue Cross patient survey.

If following inspection, the defendant desires to press his motion for new trial on the basis of a *Brady* violation in respect of those materials alone, he is entitled, upon proper notice to the court and the Government, to have the motion reconsidered on that basis. In that event, the district court should conduct an evidentiary hearing to determine: (a) whether the materials in issue were made available for defendant's inspection in the open file pretrial inspection permitted by the Government; (b) if not, whether the materials were the subject of specific or general request under *Agurs*; and (c) on that basis, whether the failure to produce the materials constituted a *Brady* violation requiring new trial.

Obviously, if the defendant does not timely request reconsideration of his new trial motion, or if the court finds either that the materials in issue were in fact produced by the Government or that failure to produce them did not constitute a *Brady* violation, the motion should be denied as reconsidered.

Except as remanded for the limited purpose of reconsidering defendant's new trial motion, the judgment of conviction is affirmed.

*SO ORDERED.*

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

October 22, 1984

TO: Judith A. Miller
Tommy E. Miller
Brendan V. Sullivan, Jr.
Janis H. Kockritz
Harold Ungar

### NOTICE OF JUDGMENT

Judgment was entered in Case No. 83-5283 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

*A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.*

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
Clerk

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 83-5283

---

UNITED STATES OF AMERICA,
*Appellee,*

versus

PETER V. ALEXANDER,
*Appellant.*

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[Filed Dec. 11, 1984]

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## ORDER

This matter is before the court on appellant's petition for rehearing.

1. The petition for rehearing is DENIED;

2. The opinion previously filed in this case on October 22, 1984, is hereby withdrawn and amended by substituting for Part II C in that opinion the following:

### C

The contention that the evidence was insufficient to support conviction on false claim counts 32-34 is without merit. These counts charged false claims by misrepresentation of the existence of other insurance in violation of 18 U.S.C. § 287. The evidence indisputably showed

that Alexander misstated the actual fact on each claim; his defense was only that this misrepresentation resulted from carelessness. The jury heard the evidence and simply rejected this theory, concluding instead, as it rationally could, that the misrepresentation was intentionally a false one.

Alexander's further contention that the evidence did not show that the false claims induced payment is misplaced. It need only be proven that they had a "tendency to induce the government to act." *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983). Where, as here, entitlement to payment turned on the non-existence of other insurance, a misrepresentation that this was the fact clearly had the requisite tendency.

Entered by direction of Judge Phillips for a panel consisting of Chief Judge Winter, Judge Phillips, and Senior Circuit Judge Butzner.

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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CR. 83-86-N

UNITED STATES OF AMERICA

vs.

PETER V. ALEXANDER,
*Defendant*

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[Filed November 10, 1983]

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In the presence of the attorney for the government the defendant appeared in person on this date—November 10, 1983.

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of his right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant hereupon waived assistance of counsel.

☒ WITH COUNSEL Judith Miller and Richard G. Brydges

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING & JUDGMENT

There being a verdict of

☒ NOT GUILTY, Defendant is discharged as to Counts 35, 37 and 38.

☒ GUILTY, as to Counts 1 through 26, inclusive; 28 through 34, inclusive, and 36, 39 and 40.

Defendant has been convicted as charged of the offense(s) of violation of Title 18 USC 1341; Title 18 USC 2 (Mail Fraud); Title 18 USC 287 (False Claims); and Title 42 USC 1396h; Title 18 USC 2 (Medicaid Fraud)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

AS TO COUNTS 1 and 40: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for confinement for a period of TWO and ONE-HALF (2½) YEARS as to EACH COUNT and directed to pay a FINE of FIVE HUNDRED ($500.00) DOLLARS as to EACH COUNT. Confinement as to Count 40 is to run concurrently with sentence imposed as to Count 1.

SPECIAL CONDITIONS OF PROBATION

AS TO ALL REMAINING COUNTS: Imposition of sentence is suspended and defendant is placed on probation for FIVE (5) YEARS, usual conditions, commencing upon release from confinement.

(NOTE: Count 27 heretofore Dismissed)

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the conditions of probation at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

BOND PENDING APPEAL POSTED.

(Total Sentence: 2½ years confinement;
$1,000.00 Fine)

/s/ John A. MacKenzie
JOHN A. MACKENZIE
District Judge

## APPENDIX E

SUPREME COURT OF THE UNITED STATES

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No. A-559

PETER V. ALEXANDER,
*Petitioner,*

v.

UNITED STATES

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 11, 1985.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 23rd day of January, 1985.

## APPENDIX F

**18 U.S.C. § 2. Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

* * * *

**18 U.S.C. § 287. False, fictitious or fraudulent claims**

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

**18 U.S.C. § 1341. Frauds and swindles**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered

by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

* * * *

**42 U.S.C. § 1396h. Offenses and penalties**

(a) Making or causing to be made false statements or representations

Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter.

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment.

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person.

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both. In addition, in any case where an individual who is otherwise eligible for assistance under a State plan approved under this subchapter is convicted of an offense under the preceding provisions of this subsection, the State may at its option (notwithstanding any other provision of this subchapter or of such plan) limit, restrict, or suspend the eligibility of that individual for such period (not exceeding one year) as it deems appropriate; but the imposition of a limitation, restriction, or suspension with respect to the eligibility of any individual under this sentence shall not affect the eligibility of any other person for assistance under the plan, regardless of the relationship between that individual and such other person.

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

---

Criminal No. 83-86-N

UNITED STATES OF AMERICA

v.

PETER V. ALEXANDER

---

THE GRAND JURY CHARGES THAT:

### COUNT ONE

*Preliminary Statements*

1. At all times material to this indictment, the defendant, PETER V. ALEXANDER, was a medical doctor licensed to practice in the Commonwealth of Virginia.

2. From on or about May 15, 1978 to on or about March 1, 1979, PETER V. ALEXANDER maintained medical offices at 533 Newton Road, Virginia Beach, Virginia.

3. From on or about March 1, 1979 to December 7, 1982, PETER V. ALEXANDER maintained medical offices at Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia.

4. At all times material to this indictment "Medicaid," as provided in Title XIX of the Social Security Act of 1965 provided medical assistance for families with dependent children and aged, blind or disabled individuals

whose resources were insufficient to meet the cost of necessary medical services.

5. At all times material to this indictment, the United States Department of Health and Human Services (hereinafter "HHS" formerly Department of Health, Education and Welfare) and the Commonwealth of Virginia Department of Health administered and supervised the administration of the Medicaid program in Virginia.

6. At all times material to this indictment, the United States Government contributed at least 50% of the cost of the Medicaid program with the remaining cost provided by the Commonwealth of Virginia.

7. At all times material to this indictment, the Virginia Department of Health established procedures in accordance with regulations of HHS to compensate physicians for services provided to medical assistance recipients.

8. At all times material to this indictment, providers of medical service were required to submit Practitioner Invoice Form MAP-12 to The Computer Company, 1905 Westmoreland Street, Richmond, Virginia, the fiscal intermediary of the Virginia Medical Assistance Program.

9. At all times material to this indictment, The Computer Company acting as a fiscal intermediary under contract with the Department of Health received, processed and authorized payment to providers of services under the Medicaid program.

10. At all times material to this indictment, payment to providers of medical services under the Medicaid program were routinely sent to the providers through the United States mail.

11. At all times material to this indictment, PETER V. ALEXANDER submitted claims to Medicaid through The Computer Company for medical services pursuant to a physician participation agreement utilizing provider number 62-4945-1.

12. At all times material to the indictment The Computer Company mailed payments through the United States mails for claims submitted by PETER V. ALEXANDER to his medical office address.

13. At all times material to this indictment, the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), was a federally funded medical benefits program provided by the federal government to help pay for civilian medical care rendered to spouses and children of active duty uniformed services personnel; to retired uniformed services personnel, their spouses and children; to spouses and children of deceased active duty; and deceased retired uniformed services personnel. CHAMPUS was established by Title 10, United States Code, Chapter 55 and operated in accordance with the policies and procedures set forth in Department of Defense CHAMPUS Regulation 6010.8-R.

14. At all times material to this indictment, CHAMPUS was managed and operated by the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Aurora, Colorado. OCHAMPUS contracted with private insurance organizations to help administer the CHAMPUS program particularly in processing and paying claims. These organizations are known as CHAMPUS contractors or fiscal intermediaries.

15. Between August 1, 1977 and September 30, 1981, the CHAMPUS intermediary for the Virginia Beach, Virgina area was Blue Cross/Blue Shield of Southwest Virginia, Roanoke, Virginia.

16. From October 1, 1981 through December 7, 1982, the CHAMPUS fiscal intermediary for claims submitted from the Virginia Beach, Virginia area was Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina.

17. At all times material to this indictment, PETER V. ALEXANDER submitted CHAMPUS Claim Form 500 to the fiscal intermediaries for OCHAMPUS as a pro-

vider of medical services under doctor number VA V16930265.

18. At all times material to this indictment under CHAMPUS Regulation 6010.8-R, Chapter VII, a participating doctor provider's signature on a CHAMPUS claim form must certify that the specific medical care listed on the claim form was in fact rendered to the specific beneficiary/patient for which the benefits are being claimed on a specific date indicated.

19. At all times material to this indictment where the CHAMPUS beneficiary is eligible for medical benefits covered through another plan's insurance, CHAMPUS Regulation 6010.8-R, Chapter VII requires that the following information be provided on the CHAMPUS claim forms submitted by the provider to the CHAMPUS fiscal intermediary for payment.

a. Name of other coverage;

b. Source of double coverage;

c. Employer information; and

d. Identification number.

This information was required for coordination of benefits of the payment of CHAMPUS benefits with the payment of benefits made by the double coverage plan so that there would be no duplication of benefits paid between the double coverage plan and CHAMPUS.

20. At all times material to this indictment the CHAMPUS fiscal intermediary mailed payments through the United States mail for claims submitted by PETER V. ALEXANDER to his medical office address.

21. At all times material to this indictment, Blue Cross/Blue Shield of Virginia, Richmond, Virginia, was a plan for furnishing prepaid hospital, medical or surgical services and similar or related services established

under the authority of the Code of Virginia Sections 38.1-810, 811.

22. At all times material to this indictment, PETER V. ALEXANDER submitted claims to Blue Cross/Blue Shield of Virginia for medical services using provider number 01602 on Health Insurance Claim Form 95.

23. At all times material to this indictment Blue Cross/Blue Shield of Virginia mailed payments through the United States mail for claims submitted by PETER V. ALEXANDER to his medical office address.

SCHEME

24. From on or about May 15, 1978 to on or about December 7, 1982, the defendant, PETER V. ALEXANDER, devised and intended to devise a scheme and artifice to defraud and to obtain money from HHS, the Virginia Department of Health, CHAMPUS and Blue Cross/Blue Shield of Virginia, by means of false and fraudulent pretenses and representations.

25. It was part of the scheme and artifice that from on or about May 15, 1978 to on or about December 7, 1982, the defendant, PETER V. ALEXANDER would and did prepare and cause to be prepared claims to CHAMPUS, Blue Cross/Blue Shield of Virginia and Medicaid in which PETER V. ALEXANDER submitted duplicate claims for the same services to more than one health care plan without disclosing the duplicate coverage to each plan.

26. It was further a part of the scheme and artifice that PETER V. ALEXANDER fraudulently used the Procedure Codes contained in Physicians' Current Procedural Terminology, Third and Fourth Editions in order to falsely submit claims to CHAMPUS, Blue Cross/Blue Shield of Virginia and Medicaid.

27. It was further a part of the scheme and artifice that the defendant, PETER V. ALEXANDER, would

and did prepare and cause to be prepared claims to CHAMPUS, Blue Cross/Blue Shield and Medicaid which he claimed to have performed services, i.e.:

a. Pregnancy test (Chorionic Gonadotropin, bioassay; qualitative).

b. Basic Miscroscopic Examination (Smear, primary source, with interpretation; routine stain for bacteria, fungi or cell types);

c. Wet and dry mount microscopic examination (Wet and dry mount; with interpretation for ova and parasites);

d. Urinalysis (routine without miscroscopey).

When in truth and in fact these tests were not performed.

27. It was further a part of said scheme and artifice to defraud that the defendant, PETER V. ALEXANDER, submitted claims for payments for pregnancy tests that he claimed to have performed on women whom he knew had been sterilized.

28. It was a further part of the said scheme and artifice that the defendant, PETER V. ALEXANDER, would state on the claim forms that he had diagnosed an illness for patients who were making routine non-illness related office visits knowing that CHAMPUS and Medicaid would not pay for visits to a physician unless there was a diagnosis of injury or illness stated on the claim for payment.

29. It was further a part of the scheme and artifice that PETER V. ALEXANDER submitted claims to CHAMPUS, Blue Cross/Blue Shield of Virginia and Medicaid which charged higher fees than he charged to cash paying patients who had received the same level or type of services.

30. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER submitted claims to CHAMPUS and Medicaid in which

he stated that he had given comprehensive service to a patient for payment at a higher rate when in fact he had only given brief service and intermediate service which paid the provider of medical services a lower rate of payment.

31. It was further a part of the said scheme and artifice that the defendant, PETER V. ALEXANDER, submitted claims to CHAMPUS and Medicaid for post operative office visits by surgery patients even though such post operative visits are included in the claim for the surgery allowance.

32. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER received at least $47,927.74 from CHAMPUS for over payment for the false claims submitted to CHAMPUS.

33. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER received at least $21,538.02 from Blue Cross/Blue Shield of Virginia for over payment for the false claims submitted to Blue Cross/Blue Shield of Virginia.

34. It was further a part of the said scheme and artifice that the defendant PETER V. ALEXANDER received at least $20,874.25 from Medicaid for over payment for the false claims submitted to Medicaid.

35. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 9, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Peter V. Alexander, M.D., Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia containing, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 30, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check no. 9134733 from Blue Cross/Blue Shield of Southwest Virginia, Roanoke, Virginia, the fiscal intermediary for CHAMPUS, in the amount of $1,451.46, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about February 24, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 9140754 from Blue Cross/Blue Shield of Southwest Virginia, Roanoke,

Virginia, the fiscal intermediary for CHAMPUS, in the amount of $818.15, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about June 2, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 9162983 from Blue Cross/Blue Shield of Southwest Virginia, Roanoke, Virginia, the fiscal intermediary for CHAMPUS, in the amount of $1,255.55, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 7, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed

and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00101877 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $2,816.65, which envelope had been sent and delivered by the United State Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about May 28, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00294858 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $521.17, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about June 12, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00306215 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $116.65, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about August 13, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00378075 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $100.66, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 19, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00415030 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $466.36, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 30, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 00448239 of Blue Cross/Blue Shield of South Carolina, Columbia,

South Carolina, the fiscal intermediary for CHAMPUS in the amount of $1,161.49, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about November 19, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0000057607 of Blue Cross/Blue Shield of South Carolina, Columbia, South Carolina, the fiscal intermediary for CHAMPUS in the amount of $1,047.72, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 29, 1978, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, re-

moved and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0572239 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,040.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about October 27, 1978, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0593939 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,345.50, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 12, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0661370 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $3,082.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about February 23, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to 533 Newtown Road, Virginia Beach, Virginia, containing check number 0695534 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,428.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about April 13, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0734869 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,983.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 20, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0113359 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the

amount of $1,097.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about September 28, 1979, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0169978 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $697.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 18, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized

depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0263572 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $2,158.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about February 22, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0293785 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $2,037.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about May 16, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0378374 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $872.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about August 22, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0141100 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $1,185.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT TWENTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 16, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0287140 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $3,058.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

## COUNT TWENTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about March 27, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0360082 of The Computer Co., the fiscal intermediary for the Virginia Medical As-

sistance Program, Richmond, Virginia, in the amount of $1,234.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 3, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0507247 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $804.00, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 29, 1982, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed

and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 0729379 of The Computer Co., the fiscal intermediary for the Virginia Medical Assistance Program, Richmond, Virginia, in the amount of $699.30, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about June 10, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 070330 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $1,756.65, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 7, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 531088 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $469.00, which envelope had been sent and delivered by United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT TWENTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about July 15, 1980, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 105770 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $896.35, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTY

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment

and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about January 13, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 311956 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $4,524.25, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges the allegations contained in Count One, paragraphs 1 through 34 of this indictment and those allegations are incorporated by reference as if fully set forth herein.

2. For the purpose of executing the aforesaid scheme and artifice to defraud and in furtherance thereof, on or about May 26, 1981, the defendant, PETER V. ALEXANDER, in the Eastern District of Virginia, removed and caused to be removed from an authorized depository for mail matter an envelope addressed to Bayside Medical Plaza, 816 Independence Boulevard, Virginia Beach, Virginia, containing check number 482667 of Blue Cross/Blue Shield of Virginia, Richmond, Virginia, in the amount of $958.65, which envelope had been sent and delivered by the United States Postal Service.

(In violation of Title 18, United States Code, Sections 1341 and 2.)

COUNT THIRTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 22, 1980, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Josephine Cortese when PETER V. ALEXANDER then knew that claim was fraudulent in that defendant's claim form falsely stated that Josephine Cortese did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, under a Blue Cross/Blue Shield of Virginia policy under which Josephine Cortese held coverage. Defendant's submission of a falsified claim caused CHAMPUS to pay for laboratory tests which were paid, and should have been paid, by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 26, 1980, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Margaret Adamson when PETER V. ALEXANDER then knew that claim was fraudulent in that his claim form falsely stated that Margaret Adamson did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, claiming payment for the same medical services under a Blue Cross/Blue Shield of Virginia

policy held by Margaret Adamson. Defendant's submission of a falsified CHAMPUS claim caused CHAMPUS to pay $600.00 as its maximum allowable payment, instead of $400.00 it should have paid by taking in to account payments by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 16, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Louise Ison when PETER V. ALEXANDER then knew that claim was fraudulent in that defendant's claim form falsely stated that Louise Ison did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, under a Blue Cross/Blue Shield of Virginia policy under which Louise Ison held coverage. Defendant's submission of a falsified claim caused CHAMPUS to pay for laboratory tests which were paid, and should have been paid, by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 14, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services

allegedly supplied to Frances Cox when PETER V. ALEXANDER then knew that claim was fraudulent in that he claimed to have performed a pregnancy test for her on March 16, 1981, knowing that he had performed a permanent sterilization by removal of her Fallopian tubes (bilateral salpingectomy) on January 16, 1981.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 2, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Lois Donaldson when PETER V. ALEXANDER then knew that claim was fraudulent in that:

1. Defendant had already received payment for the office visit claimed on this claim, as a post-operative visit after surgery performed on May 1, 1981, for which he had already received payment from CHAMPUS; and

2. Defendant claimed to have performed a pregnancy test for Lois Donaldson on May 8, 1981, knowing that he had performed a dilation and curettage of her uterus and permanent sterilization by ligation of her Fallopian tubes on May 1, 1981.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 30, 1981, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the De-

partment of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Patricia Repko when PETER V. ALEXANDER then knew that claim was fraudulent in that defendant's claim form falsely stated that Patricia Repko did not have any other active insurance, when in fact defendant had submitted a claim to Blue Cross/Blue Shield of Virginia, under a Blue Cross/Blue Shield of Virginia policy under which Patricia Repko held coverage. Defendant's submission of a falsified claim caused CHAMPUS to pay for laboratory tests which were paid, and should have been paid, by Blue Cross/Blue Shield of Virginia.

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 7, 1982, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Evangeline Berka when PETER V. ALEXANDER then knew that claim was fraudulent in that he claimed to have performed the following tests, which he had not in fact performed:

1. Urinalysis, routine, without microscopy (procedure code 81002);

2. Pregnancy test (chronic gonadotropin, bioassay, qualitative, procedure code 82996);

3. Smear, primary source, with interpretation, routine strain for bacteria, fungi, or cell types (procedure code 87205); and

4. Wet and dry mount, with interpretation, for ova and parasites (procedure code 87211).

(In violation of Title 18, United States Code, Section 287.)

COUNT THIRTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 14, 1982, in the Eastern District of Virginia, the defendant, PETER V. ALEXANDER, did present to the Civilian Health and Medical Program of the United States (CHAMPUS), an agency of the Department of Defense of the United States, for payment of a claim against the United States for medical services allegedly supplied to Evangeline Berka when PETER V. ALEXANDER then knew that claim was fraudulent in that:

1. Defendant had already received payment for the office visit claimed on this claim, as a post-operative visit after surgery performed on December 18, 1981, for which he had already received payment from CHAMPUS; and

2. Defendant claimed to have performed the following tests, which he had not in fact performed:

a. Urinalysis, routine, without microscopy (procedure code 81002);

b. Wet and dry mount, with interpretation, for ova and parasites (procedure code 87211);

c. Smear, primary source, with interpretation, routine stain for bacteria, fungi, or cell types (procedure code 87205); and

d. Pregnancy test (chorionic gonadotropin, bioassay, qualitative, procedure code 82996).

(In violation of Title 18, United States Code, Section 287.)

## COUNT FORTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 4, 1982, in the Eastern District of Virginia, PETER V. ALEXANDER did knowingly and willfully make and cause to be made a false statement of a material fact in an application for payment of services through the Virginia Medical Assistance Program, a State approved medical assistance plan under Title 42, Chapter 7 of the United States Code in that PETER V. ALEXANDER fraudulently stated that he had performed a urinalysis, a wet and dry mount microscopic examination, a basic microscopic examination and a pregnancy test during an examination of Patricia Jeffcoat on August 17, 1981, when he knew that no such tests had been performed.

(In violation of Title 42, United States Code, Section 1396h and Title 18, United States Code, Section 2.)

A TRUE BILL:

/s/ Herbert L. Briggs
Foreman

ELSIE L. MUNSELL
United States Attorney

By: /s/ Tommy E. Miller
TOMMY E. MILLER
Assistant United States Attorney

## APPENDIX H

### (CROSS EXAMINATION OF MR. HALLORAN BY TRIAL COUNSEL RE PEER GROUP)

Q. These other doctors that you examined, this peer group you are telling us about, Mr. Halloran, they were general surgeons, were they not?

A. And OB/GYN

Q. In general surgeons do a great deal of their testing in the hospital, don't they?

A. They don't do a great deal of testing.

Q. Well, why did you select them?

A. I didn't select them. This is a so-called management report that is generated every quarter for Medicaid and this was the peer group as set up by people other than myself. And I simply went and pulled those records.

Q. All right.

A. I can't explain why surgeons are in it any more than you can, sir.

Q. So you can't tell the jury how much of the testing that you are talking about, 90 some percent. They may have 90 percent done in the hospital there. You don't know that, do you, as opposed to a one man practitioner who does it all in his office?

A. I think that Dr. Alexander had patients in the hospital, too.

Q. But his operative reports?

A. One would offset the other.

Q. Did you read his operative reports?

A. Yes.

Q. And they showed that testing was done in the hospital?

A. Yes, sir.

Q. But you got general surgeons in here that probably do little or no testing in their office; isn't that a fair statement?

A. But still from a statistical standpoint they are doing, they would wash themselves out.

Q. How do you know that?

A. I have had about fifteen hours in statistics.

Q. I understand that. But the doctors would be the ones to express that opinion; wouldn't they. How much they did in the office and how much did testing, instead of you coming in here and saying he did 90 percent more than somebody else. You don't know what the circumstances or variables of that are, do you, of your own knowledge, except you compared them to a group of some people?

A. Compared them to all obstreticians and gynecologists in the state.

Q. For doing what kinds of diagnostic testing?

A. Any.

Q. Any kind?

A. Yes.

Q. Not hospital—

A. No, not x-rays. Strictly to pathological examinations, so called patient log.

Q. Did you isolate OB/GYNs from the general surgeons or lump them all together?

A. They are all together.

Q. Dr. Alexander is not a general surgeon, is he?

A. No.

Q. Why did you put him in there?

A. I didn't put him even in there.

Q. All right, Mr. Halloran.

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MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1437

# In the Supreme Court of the United States

OCTOBER TERM, 1984

PETER V. ALEXANDER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

## QUESTIONS PRESENTED

1. Whether the indictment was insufficiently specific.

2. Whether the admission of testimony concerning the significance of statistical data gathered by a party other than the witness was plain error.

3. Whether the court of appeals erred in ordering a hearing on only one of the *Brady* issues raised by petitioner.

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 748 F.2d 185.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on October 22, 1984. A petition for rehearing was denied on December 11, 1984 (Pet. App. 19a-20a). On January 23, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 11, 1985 (Pet. App. 24a) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on 30 counts of mail fraud, in violation of 18 U.S.C.

1341 (Counts 1-26 and 28-31), five counts of submitting a false claim to an agency of the United States, in violation of 18 U.S.C. 287 (Counts 32-34, 36, and 38) and one count of making a materially false statement in connection with a state Medicaid program, in violation of 42 U.S.C. 1396h (Count 40). Petitioner was sentenced to concurrent 30-month terms of imprisonment and cumulative $500 fines on Counts 1 and 40, with imposition of sentence on all other counts suspended in favor of probation for five years following his release.

The evidence at trial showed that petitioner, a gynecologist, submitted fraudulent insurance claims to three major health insurers — the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), Medicaid, and Blue Cross/Blue Shield — from May 15, 1978, through December 7, 1982. For example, a CHAMPUS auditor testified at trial that although petitioner submitted claims for performing thousands of medical tests on patients, petitioner's office records reflected the result of only one such test on one patient (Pet. App. 4a). Documentary evidence showed that petitioner claimed to have performed the same tests on all of his patients even though it is very unlikely that the same tests were warranted in all cases (*id.* at 5a). Petitioner's medical secretaries testified that petitioner discarded and never tested the urine samples he collected and that he was never seen performing microscopic analysis (*ibid.*). Four scientific experts (two obstetrician/gynecologists, one microbiologist, and one pathologist) examined petitioner's microscope and stated that they considered it inadequate to perform some of the tests petitioner claimed to have performed (C.A. App. 210-216, 238-239, 306-307, 313-315, 327-334). Petitioner's records recorded the blood pressure of patients as 120/60 in 90% of the records, a statistic that the experts considered very improbable because blood pressure normally varies from patient to patient

(C.A. App. 218, 234). There was evidence that petitioner claimed to have performed pregnancy tests on women who had been sterilized, a procedure that is rarely medically necessary (C.A. App. 217, 232). And petitioner submitted a claim for tests he did not perform on an undercover law enforcement officer who posed as a patient (C.A. App. 264-265, 496-499).

Petitioner obtained new counsel—the counsel now representing him—after his conviction. On appeal, petitioner raised a number of contentions, including a challenge to the sufficiency of the evidence, a claim that trial counsel was incompetent, and a claim that the government failed to produce requested exculpatory material as required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). The court of appeals found that the evidence was sufficient to support the convictions (Pet. App. 3a-8a). The court "express[ed] no opinion" on petitioner's claim that trial counsel was constitutionally ineffective, stating that "that claim is more properly considered in [petitioner's] pending motion in the district court for relief under 28 U.S.C. § 2255" (Pet. App. 9a). The court of appeals also remanded one aspect of petitioner's *Brady* and *Agurs* claim; it noted that the prosecutor had opened ~~its~~ his files to defense counsel before trial but ordered the district court to determine whether certain materials were in the files at the time (Pet. App. 9a-16a). All of petitioner's other contentions were rejected.

## ARGUMENT

1. Petitioner's principal contention (Pet. 9-16) is that the indictment was insufficiently specific. Fed. R. Crim. P. 12(b)(2) provides that "[d]efenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction * * * or to charge an offense * * *)" must be raised before trial. Petitioner failed to raise his objection to the specificity of the indictment before trial;

the objection has therefore been waived. Fed. R. Crim. P. 12(f). Indeed, petitioner did not even raise this contention in his opening brief in the court of appeals,[1] and the court of appeals accordingly did not address it. That is an additional reason for this Court to deny review.

In any event, petitioner's contention is without merit. Paragraphs 24-27 of Count 1 of the indictment (Pet. App. 32a-33a), entitled "Scheme," specified the ways in which petitioner defrauded the insurers—for example, by "submitt[ing] duplicate claims for the same services to more than one health care plan without disclosing the duplicate coverage to each plan" (para. 25; Pet. App. 32a); by "prepar[ing] claims * * * [in] which he claimed to have performed" certain specified medical tests "[w]hen in truth and in fact these tests were not performed" (para. 27; Pet. App. 32a-33a); and by "submitt[ing] claims for payments for pregnancy tests that he claimed to have performed on women whom he knew had been sterilized" (para. 27; Pet. App. 33a). Each of Counts 2 through 31 then realleged these allegations and specified, by number and amount, a check that was mailed in furtherance of the fraudulent scheme (Pet. App. 35a-51a). Thus, as petitioner apparently now concedes, the indictment clearly alleged each of the elements of the offense of mail fraud.[2]

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[1]The only contention concerning the indictment made in petitioner's opening brief in the court of appeals was that "Count 1 states no federal offense." Pet. C.A. Br. 28 (footnote omitted).

[2]Count 1 alleged a fraudulent mailing but, apparently because of an oversight, did not identify the check. Petitioner challenged Count 1 on this ground in the court of appeals (see note 1, *supra*) but does not renew this contention in this Court.

Counts 32 through 40 alleged particular fraudulent claims (Pet. App. 52a-57a), and petitioner does not appear to assert that they are insufficiently specific; he raises this challenge only to the mail fraud counts of the indictment.

Petitioner nonetheless asserts that the indictment was inadequate because the checks specified in the indictment included payments for several claims, and the indictment, while alleging that each check included payment for at least one fraudulent claim, did not specify which of the claims was alleged to be fraudulent. Petitioner mingles together suggestions that the indictment thus failed to give him sufficient notice of the charges against him and therefore handicapped the preparation of his defense (*e.g.*, Pet. 10, 11, 13-14) with the conceptually distinct argument that the indictment violated the grand jury guarantee of the Fifth Amendment because petitioner might have been "convict[ed] on facts not found by, and perhaps not even presented to, the grand jury that indicted him" (Pet. 9-10). Neither argument merits review.

a. Petitioner's claim that the indictment did not give him adequate notice is in fact an attack not on the indictment but on the tactics of petitioner's trial counsel. If a defendant believes his indictment does not adequately specify the basis of the charges against him, he has an easily available remedy in the form of a bill of particulars. If he believes that, in view of the charges stated in the indictment, the prosecution's evidence has unfairly surprised him, he may seek a continuance. Petitioner's trial counsel did neither. As petitioner himself stated in his brief in the court of appeals, in the course of an attack on the competence of his trial counsel (Pet. C.A. Br. 7-8; footnotes omitted):

> Such additional specification as would be needed for the preparation of a defense—*i.e.*, which were the claim or claims alleged to have been fraudulent and in what respect or respects were they allegedly fraudulent—might have been furnished voluntarily by the prosecution and, if not, would undoubtedly have been ordered by the Court, had defendant's counsel sought a

> a bill of particulars under Fed. R. Crim. P. 7(f). However, no bill of particulars was requested, so that not until the prosecution presented its proof at trial did the defendant learn what he was charged with. Whether that disadvantage could have been remedied by requests for a continuance upon discovery of the nature of the alleged offenses is a purely academic question, for no such continuance was ever requested.

Thus, petitioner's trial counsel—whose competence is not now in issue and who was in the best position to assess the extent to which any lack of specificity in the indictment hampered the defense he intended to prepare—did not consider the indictment insufficiently specific or the defense unfairly surprised. Petitioner's quarrel, therefore, is not with the indictment but with trial counsel.

b. Petitioner's argument that he might have been convicted of an offense on which the grand jury did not indict him is precluded by *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985). In *Miller*, this Court held that the grand jury guarantee of the Fifth Amendment is not violated if a defendant is convicted "for a criminal plan narrower than, but fully included within, the plan set forth in the indictment" (slip op. 8). Here, the proof at trial had the effect of making more specific, and thus narrowing—not broadening—the scheme described in the indictment. In other words, if the indictment in this case had alleged that every claim paid by every check specified in the indictment was fraudulent, *Miller* would dictate that petitioner—having been convicted, by sufficient evidence, of a narrower scheme—would be entitled to no relief. The fact that the indictment did not make such sweeping allegations—instead, it left petitioner free to inquire, by seeking a bill of particulars, precisely which claims were alleged to be fraudulent—is scarcely a circumstance of which petitioner can complain.

2. a. Petitioner also contends that the district court erroneously admitted hearsay evidence. The evidence in question consisted of statistical "peer group" studies that compared the number of tests per patient and per visit for which petitioner billed Medicaid and Blue Cross/Blue Shield with the billing practices of other physicians. Charles Halloran, a Medicaid auditor, and Barbara Crumpler, a Blue Cross/Blue Shield auditor, testified to the results of the studies. Halloran (but apparently not Crumpler) obtained the statistics concerning petitioner's "peer group" from another report. Both studies showed that petitioner billed for far more tests per patient and per visit than the average of the other physicians. See Pet. App. 5a; C.A. App. 254-255, 280-281; Pet. 18.

When Halloran began to testify about his study, petitioner's trial counsel objected, but not on hearsay grounds; he objected that the evidence was not sufficiently probative because petitioner's patients and medical practice might differ in significant ways from those of the physicians in the "peer group" with which he was being compared. The district court overruled the objection, stating that petitioner could seek to undermine the evidence on cross-examination. C.A. App. 254. On cross-examination, petitioner's trial counsel challenged the study on the ground that the peer group with which petitioner was compared included surgeons, who, counsel urged, are likely to perform fewer tests in their offices than gynecologists like petitioner. *Id.* at 270-271. The following exchange occurred (*ibid.*):

> Q. These other doctors that you examined, this peer group you are telling us about, Mr. Halloran, they were general surgeons, were they not?
>
> A. And OB/GNY.

Q. In general surgeons do a great deal of their testing in the hospital, don't they?

A. They don't do a great deal of testing.

Q. Well, why did you select them?

A. I didn't select them. This is a so-called management report that is generated every quarter for Medicaid and this was the peer group as set up by people other than myself. And I simply went and pulled those records.

Q. All right.

A. I can't explain why surgeons are in it any more than you can, sir.

Petitioner made the "[s]ame objection, for the record" (C.A. App. 280) to Crumpler's testimony, and it too was overruled. Petitioner did not cross-examine Crumpler about the way in which she compiled the statistics. After the trial, petitioner—represented by his current counsel—sought a new trial partly on the ground that the peer group studies were hearsay; the district court denied the motion, ruling that the studies were admissible and remarking that they "would seem harmless" in any event (*id.* at 1110). The court of appeals rejected petitioner's contention that the admission of the studies required reversal of his conviction on the ground that there was no showing that the trial court had abused its discretion (Pet. App. 5a n.6).

b. Petitioner's fact-bound contention plainly does not merit review by this Court. Because petitioner did not raise his hearsay objection at trial,[3] he is entitled to relief only if the admission of the evidence was plain error. See Fed. R. Crim. P. 52(b). As this Court has recently cautioned, the

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[3]The district court's ruling on the objection that petitioner did make was plainly correct.

plain error doctrine "authorizes the * * * correct[ion] only [of] 'particularly egregious errors,' *United States* v. *Frady*, 456 U.S. 152, 163 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' *United States* v. *Atkinson*, 297 U.S. [157,] 160 [1936]." *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14. This standard was manifestly not met in this case.[4]

Even assuming that petitioner is correct in characterizing the peer group studies as hearsay, their hearsay nature would have hampered efforts by defense counsel to question only the accuracy of the statistics themselves — that is, to show that in fact the doctors in the peer group with which petitioner was compared performed more tests than Halloran and Crumpler said they did. But neither petitioner's trial counsel nor his current counsel has shown any inclination to pursue such a line of attack. Rather, trial counsel attempted to show, and petitioner's current counsel contends (see, *e.g.*, Pet. 17-18), that it was meaningless to compare petitioner to the peer groups because his medical practice was so different.

The alleged hearsay nature of the evidence in no way impeded petitioner from making this showing. Once the reliability of the statistics showing the number of tests by the peer group is conceded — and even now petitioner does not suggest that he would challenge their reliability — it is immaterial whether the persons who compiled those statistics were available for cross-examination. The cross-examination of Halloran and Crumpler on the significance of the comparison between petitioner and the peer group was not

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[4]Petitioner now frames his contention as a claim under the Confrontation Clause. See, *e.g.*, Pet. i, 16, 19-20. But petitioner did not rely on the Confrontation Clause even in the court of appeals. See Pet. C.A. Br. 34-39.

in any way affected by whether they compiled the underlying statistics. That is the only line of cross-examination that petitioner's trial counsel attempted, and it is the only line of cross-examination that petitioner's current counsel suggests. See, *e.g.*, Pet. 18. Indeed, Halloran's testimony that he was unable to explain why surgeons were included in the peer group — testimony that petitioner cites as an example of how he was prejudiced by the admission of hearsay (see Pet. 17) — in fact demonstrates that trial counsel's cross-examination on this point was successful.

3. Finally, petitioner contends (Pet. 20-23) that the court of appeals erred by not ordering further proceedings—of a kind that petitioner only vaguely describes—on various discovery issues.

a. Petitioner made several discovery requests before trial. In response, the government allowed "open-file discovery" (Pet. App. 11a). After the trial, petitioner's new counsel learned of a survey of Blue Cross/Blue Shield subscribers for whom petitioner claimed to have performed services and moved for a new trial on the ground that this survey had been suppressed by the government.

At the hearing on the motion for a new trial, government counsel represented that the survey was among the "open file" documents made available to defense counsel prior to trial. The district court denied the motion. Pet. App. 12a & n.9. At oral argument, however, government counsel made a conflicting statement; and although the government corrected that statement in a post-argument memorandum, the court of appeals thought the matter sufficiently unclear to require a remand and a hearing before the district court on the question whether the survey materials were in the open file that was made available to defense counsel. Pet. App. 10a-16a.

Before determining to order these further proceedings, however, the court of appeals considered the government's contention that the survey documents were so immaterial that even a failure to disclose them would not have violated the government's obligations under *Brady* and *Agurs*. The court ruled that the documents were not so obviously immaterial as to render further proceedings concerning them pointless and left the question of materiality for the consideration of the district court on remand. Pet. App. 14a-15a.

b. Petitioner seizes upon the court of appeals' ruling on the government's contention to argue that "the government erred by using the wrong standard to evaluate whether evidence in its possession was exculpatory" and therefore subject to a duty of disclosure (Pet. 21 (footnote omitted)). But there is no showing that the government used *any* standard to withhold materials on the ground that they were not exculpatory. The court of appeals suggested that the survey documents, if they were not in the file, might have been in the hands of Blue Cross/Blue Shield (in which event the government would not ordinarily have an obligation to disclose them to defense counsel at all) or might have been withheld from the open file by agents who did not heed instructions to place all the documents in the open file. See Pet. App. 13a-14a. But the court did not suggest—and petitioner cites no evidence suggesting—that the government excluded the survey materials or any other documents from the file on the basis of an assessment of their exculpatory character. The mere fact that the government urged that the question whether the survey documents were in the file was immaterial because the documents were not sufficiently exculpatory, does not mean that the government "applied an * * * interpretation of *Brady* v. *Maryland*" (Pet. 23) in deciding which documents to place in the file in

the first place. The court of appeals manifestly considered the fact-bound discovery questions raised by petitioner's new counsel with great care, and there is no reason for this Court to second-guess its determinations.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

JANIS KOCKRITZ
*Attorney*

MAY 1985

DOJ-1985-05

No. 84-1437

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

PETER V. ALEXANDER,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF FOR PETITIONER

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IN THE

# Supreme Court of the United States

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## REPLY BRIEF FOR PETITIONER

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### I. The Indictment Failed to Provide Notice and Failed to Limit the Petit Jury to Facts Considered by the Grand Jury.

Notice of the specific charges of fraud returned by a grand jury—"which of course are among the important concerns underlying the requirement that criminal charges be set out in an indictment"—was not given in this case. *United States* v. *Miller*, 105 S.Ct. 1811, 1814 (1985), relying on *Russell* v. *United States*, 369 U.S. 749, 763-64 (1962). Nor did the grand jury find fraudulent, or even consider, the specific claims on which the petitioner was convicted. The government does not contend otherwise.

Despite these fundamental errors, the government nevertheless urges that certiorari should be denied—by ignoring the holding in *Russell*; by stating that the court of appeals did not address this issue, when it did; and by misconstruing this Court's recent opinion in *Miller*.

First, and contrary to the government's representation (Opp. 4), the court of appeals expressly addressed the indictment's sufficiency on the merits, but mistakenly concluded that any deficiencies in notice could be cured by a bill of particulars.[1] The issue of indictment sufficiency was thus ruled upon by the court of appeals, and is properly before this Court.

Second, the government does not challenge petitioner's contention that the indictment in fact fails to give adequate—or indeed any—notice of the specific claims alleged to be fraudulent. It does not contest that, under the terms of the indictment, the government was left free to choose from among any of six hundred forty-one patient claims and over three thousand patient services covered by the checks identified in the mail fraud counts in presenting its case on the respective counts at trial. *See* Petition for Certiorari 13-14. Instead, the government follows the court of appeals' analysis that the indictment's lack of specificity could have been ameliorated by a request for a bill of particulars. That was, however, precisely the argument made, and rejected, in *Russell* v. *United States*:[2]

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[1] The court of appeals stated that "we reject the contention that the indictment as a whole did not give adequate notice of the charges against Alexander; any need for further detail could have been applied by a timely-requested bill of particulars." Pet. App. 9a. The court of appeals also rejected the specific point that Count 1 failed to charge a critical element of the crime. Pet. App. 9a.

[2] The government also characterizes the failure to seek particulars as a matter of trial counsel tactics. *Russell*, however, also makes clear that a failure to seek particulars has no weight in evaluating whether the indictment itself is invalid. 369 U.S. at 769, n.16.

> It is argued that any deficiency in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment . . . To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.

369 U.S. at 770.

From the grand jury transcript recently produced to the petitioner by government counsel, and attached to this reply as Appendix I,[3] it is apparent that a bill of particulars could have provided *no* information as to what was in the minds of the grand jury, since *no* specifics were ever identified to the grand jury. The precise evils identified in *Russell*—allowing the prosecutor to "guess" what was in the minds of the grand jury and to fail to present any specific evidence to the grand jurors at all—are thus cogently illustrated in this case.

The transcript of the sole witness to testify before the grand jury reveals that the government presented no evidence even of a mailing with respect to Count One.[4]

---

[3] The government has represented to petitioner, and to the trial court, that this transcript (comprising hearsay testimony by Agent Powell) contains the only evidence that was presented to the grand jury. The government has also represented that no exhibits were presented to the grand jury; nor did any other witness appear. As far as we are aware, this is the first grand jury case brought to this Court where the complete grand jury testimony has been filed in the district court, and is consequently available to this Court.

[4] The government has suggested that petitioner is no longer pressing the special deficiencies of Count One before this Court. In fact, the petition specifically notes that Count One lacked the essential elements of a mail fraud offense, because not even a check is identified as being at issue. Pet. 9-10. The transcript of Mr. Powell's grand jury testimony now has revealed that a check (to support a mailing on that Count) was never identified to the grand jury. App. I 12a.

The witness, Agent Powell, instead started his description of the specific counts with Count 2. App. I 12a. With respect to all of the mail fraud counts, the grand jury heard no evidence identifying any particular claim or claims for services as false or fraudulent. The grand jury had no opportunity to reach its own conclusions on these issues, because no documents or exhibits were displayed to them. And the "testimony" of the summary witness was confined to "reciting" from the draft indictment that the prosecution asked the grand jury to return immediately after the recital was completed.[5]

In short, the grand jury transcript graphically demonstrates that the petitioner was convicted on the basis of "facts not found by" and "not even presented to" the grand jury which indicted him. *Russell* v. *United States*, 369 U.S. at 770. Under *Russell*, this failure even to present the underlying facts to the grand jury for its consideration "deprived[d] the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Id.*

The government implicitly contends that this clear violation of *Russell* makes no difference, because this Court's recent opinion in *United States* v. *Miller* permits the narrowing of charges contained in an indictment. The critical point in *Miller*, however, was that the scheme on which defendant was convicted was "fully included within" the indictment. The defendant was fully and specifically apprised of the two charges against him; he was fully prepared to meet both; and there was no question that the facts underlying both charges had been presented to the grand jury.

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[5] *See* App. I 2a, 12a (Assistant U.S. Attorney asks the witness to "recite" preliminary factual matters, and for Counts 2-31, to "recite the date and amount of check."). The indictment was returned and filed on the same date as the grand jury testimony, May 9, 1983.

Here, by contrast, *none* of the allegedly fraudulent claims for services was actually identified in the indictment or to the grand jury, and the government was left free, according to "each passing vicissitude of the trial", to pick among hundreds of possible offenses to present to the petit jury. *Russell* v. *United States*, 369 U.S. at 768. In *Miller*, the government clearly alleged in the indictment a specific two-part scheme, and then only sought to prove one part at trial. The converse is true here: the government did not allege any specific fraudulent claims in the indictment or until trial. This is not then, a case where the fraud was narrowed, but rather a case where the specific fraudulent claims were not identified in the indictment at all.

It is no answer to say, as the government does in a strawman argument here, that the indictment *could* have alleged that all of the patient claims covered by the checks identified in the mail fraud counts were fraudulent, and that picking out certain claims is therefore an acceptable narrowing of the charges. The fact is that the government never alleged—in the indictment, before the grand jury, or at trial—that all the claims covered by the checks were fraudulent. To the contrary, they conceded that petitioner did perform some tests; did bill properly on some claims; did not improperly perform pregnancy tests with respect to some patients; etc. To prepare a defense it was therefore essential to know what specific tests that petitioner had billed for, or other fraudulent acts, the government and the grand jury alleged had or had not occurred. That information was never presented to the grand jury—and was presented to the defendant only at trial.

There can be no question that the indictment in this case did not convey notice of the specific charges of fraud that the petitioner had to meet at trial. It is equally clear that the grand jury in fact never heard or saw any evidence permitting it to conclude that specific patient

claim forms were or were not fraudulent. Under *Russell* and *Miller*, these are fundamental errors that undermine the integrity of the grand jury's scrutiny of charges prior to indictment, and make it impossible for the defense to prepare its case. In short, they violate the grand jury guarantees of the Fifth and Sixth Amendments.[6] These flaws could not be remedied by a bill of particulars, as the government now claims, because no evidence identifying the allegedly fraudulent claims had even been presented to the grand jury.

This Court should grant certiorari to correct the government's fundamental departures from the requirements of *Russell* and *Miller*. Alternatively, and in view of the Court's recent decision in *United States* v. *Miller*, we ask that this Court grant certiorari and remand to the court of appeals for reconsideration in light of that case.

## II. The Issues Presented for Review Are Not "Fact Bound".

### A. Peer Group Studies.

Although not qualified as expert witnesses, and unable to explain the results and assumptions underlying the "peer group" studies conducted by others, two government auditors were permitted to testify about evaluations of how the petitioner's practice compared to his "peer group." None of the documentation or computer studies from which these conclusions were drawn was produced prior to or at trial.

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[6] Ever since *Ex parte Bain*, 121 U.S. 1 (1887), which granted habeas corpus for lack of jurisdiction, and which was recently reaffirmed in pertinent part in *Miller*, it has been recognized that a trial court is without jurisdiction to convict of a felony offense not charged by the grand jury's indictment. Thus the government's contention that petitioner's trial counsel "waived" the defect by failing to raise it is without merit. Nor could federal criminal jurisdiction be conferred by consent, even if trial counsel for some inexplicable reason had wished to do so.

The government does not seriously contest that this testimony was hearsay, or that its admission violated the Confrontation Clause (which "protect[s] similar values"),[7] but instead urges that admission of the results was not plain error and that the issue is "fact-bound." Again, the court of appeals, recognizing that an objection was made to this testimony at trial, did not apply the "plain error" standard but instead resolved it on the merits. Pet. App. 5a n.6.[8] And while any hearsay-Confrontation Clause case is in some sense "fact-bound," the legal issue created by the erroneous admission of this testimony has significance well beyond the contours of this case.

The government contends that the hearsay nature of the "peer group" evidence had only one effect—to prevent petitioner's trial counsel from questioning the accuracy of the statistics themselves. Opp. 9. This effect alone was important. It appears (from underlying documents recently produced in discovery procedings relating to the pending § 2255 Motion) that the accuracy of the statistics, and the use made of those statistics could have been undermined by vigorous cross examination.

For example, with respect to the Blue Cross "peer group" study, auditor Crumpler would have had to concede that the ratio she used to identify the petitioner Dr. Alexander as number one or two in his peer group, was not the ratio recommended by the computer program designers to evaluate potential abuse. In fact, in the two categories identified by the programmers as significant,

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[7] *See California* v. *Green*, 399 U.S. 149, 155 (1976).

[8] The court of appeals recognized that the issue was "the inability of the witnesses offering [the studies] to answer pertinent questions on cross-examination." The court of appeals, however, proceeded on the erroneous assumption, inconsistent with the record, that these "studies" were admitted into evidence (and thus in some sense available for review at trial) when in fact they were not. Pet. App. 5a n.6.

the petitioner's billings were quite similar to other "peers", and did not even make the "top 25" with respect to several of the tests in question. This point would have directly contradicted the government's assertion at the beginning of its closing argument that petitioner was "the heaviest biller in this area of Blue Cross/Blue Shield for those type tests. That should get your suspicions aroused." C.A. App. 977-78.

Auditor Crumpler would also have had to concede that the "peer group" itself was incomplete (and any implied judgment of comparability weakened) because the computer studies evaluated only the use of tests identical to the ones used by petitioner—and did not take into account similar tests that other practitioners used interchangeably with the ones used by petitioner. Similarly, auditor Halloran departed from the computer program results, by finding evidence of "abuse" where the printout itself identified no such evidence.

Without the underlying documentation on which these auditors relied, a cross-examiner could find weaknesses only by listening to the auditors' incomplete descriptions of results on direct examination. With the documents in hand, glaring errors contained in the auditors' appraisal (but not revealed by their conclusory description of results) could have been attacked from a position of strength. Such an attack was crucial in this case, where much of the evidence was circumstantial, and where absent an effective cross-examination on these studies, the government could and did open its closing and rebuttal arguments by relying on these studies as "indicia of fraud." C.A. App. 977-78, 1026.

Computer results are only as strong as the assumptions and numbers on which they rest. Here the "results" derived from the computer printouts relied on by the auditors were demonstrably misleading, and selectively presented. Only if defense counsel had access to the underlying printouts and programs, however, could that be

demonstrated. It seems an elementary point that such underlying documents must be produced before "expert" testimony as to results is permitted. *See* Fed. R. Evid. 703-05, and Petition at 19. That point was, however, missed below. This Court should provide guidance to remedy the hearsay and Confrontation Clause problems that are inevitable when computer studies undergird opinion testimony, by granting certiorari on the second question presented.

**B. Discovery.**

The government represents to this Court—as it did below—that "open-file discovery" was permitted prior to trial. The court of appeals' refusal to remand for further investigation of other discovery issues, and the government's argument to this Court that remand is unnecessary, both rest expressly on that representation. *See* Pet. App. 11a, Opp. 10. As has frequently occurred in this case, the government has shifted its position yet again. The Assistant United States Attorney involved in litigating this case at trial has now stated to the trial court that "open-file discovery" was not permitted, and that instead "Rule 16 discovery" occurred. Testimony of AUSA Miller before district court, May 24, 1985. Of course, that characterization is not accurate, either, since auditors' workpapers, peer group studies and other analyses were not produced, pursuant to "Rule 16 discovery", even though they were material to the defense, and should have been produced under Rule 16, and under *Brady* v. *Maryland*, 373 U.S. 83 (1963). When a court is confronted with multiple and inconsistent shifts in the government's factual representations regarding discovery, the proper remedy is to order a remand to the trial court to resolve these issues, as contended under question 3 of the Petition for Certiorari.

## CONCLUSION

For the foregoing reasons, together with those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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June, 1985

# APPENDIX

## APPENDIX I

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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THE UNITED STATES OF AMERICA,
*Plaintiff*

v.

JOHN DOE,
*Defendant.*

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TESTIMONY OF ORNRAN MICHAEL POWELL

Norfolk, Virginia

May 9, 1983

Before the United States Grand Jury

Appearances:

By: TOMMY E. MILLER, ESQUIRE
Assistant United States Attorney
Counsel for the Plaintiff

[2] ORNRAN MICHAEL POWELL, being first duly sworn testified before the United States Grand Jury as follows:

EXAMINATION

BY MR. MILLER:

Q. State your full name and occupation, please?
A. Name is Ornran Michael Powell. I am a special agent with the Department of Defense.

Q. Okay. Have you had occasion to review the proposed indictment charging United States of America v. Peter V. Alexander?

A. Yes, I have.

Q. And do you find it to be in conformity with the results of your investigation?

A. Yes, I do.

Q. What other agency outfitted are you investigating?

A. In the Virginia Health Department we assisted, Medicaid assisted me. CHAMPUS did and also Blue Cross and Blue Shield of Virginia audited some of the records in the case.

Q. Okay. Count one has a series of preliminary statements involving factual matters, could you recite?

A. Yes.

Q. Who is Peter V. Alexander?

A. He is a medical doctor and obstetrician/gynecologist who has a private practice in Virginia Beach, [3] Virginia, has had since the mid 70's.

Q. Where did they maintain the office from May 15th, 1978 or on or about March, 1979?

A. At 533 Newtown Road, Virginia Beach and then after that until the present really he has his office on Bayside Medical at 816 Independence Boulevard, Virginia Beach.

Q. Preliminary statement ends with December 7, 1982; is that correct?

A. That is.

Q. What happened on that date?

A. On that date, I and two other investigators carried out a search warrant at his office to seize various medical records.

Q. And those records have been used in the audit and examination of Dr. Alexander's claims against Blue Cross and Blue Shield?

A. Yes, sir.

Q. Paragraph four defines Medicaid, I believe?

A. Yes.

Q. What is that?

A. That is a program, majority of which is funded by the federal government and partially funded by the state of Virginia which provides medical assistance for families with dependents and also the aged, blind and disabled individuals who don't have enough money to pay for their medical services.

[4] Q. As provided for by Title 19 of the Social Security Act of 1965; is that correct?

A. Right. Federal law and the Department of Health and Human Services, which used to be called Health, Education, and Welfare, set up regulations and the Virginia Department of Health administers it and at all times throughout this period covered by this indictment the U.S. Government paid at least 50 percent of the cost of Medicaid.

The actual payment of bills is handled by the computer company in Richmond, Virginia which receives the claim forms from the doctors, processes them and sends the payment checks out to the doctors through the U.S. mail.

Q. Where is that computer company located?

A. 1905 Westmoreland Street, Richmond, Virginia.

Q. How does a doctor submit a claim?

A. He sends a standard form to the computer company. The number of the form is MAP-12. On this form he lists what medical services he claims to have provided to the patient, and then the computer company pays him based on that claim form and based on whatever standards they go by as to the maximum allowences.

Q. And how are the claims paid?

A. They send a check through the U.S. mails to the provider, to the doctor or hospital.

Q. That is the routine method of payment; is that [5] correct?

A. Yes.

Q. And at all times material to this indictment, was Peter V. Alexander submitting claims to Medicaid?

A. Yes, he did.

Q. Did he have a number?

A. Yes. He had a provider number 62-4945-1.

Q. Okay. And I believe he signed a physician participation agreement?

A. Right, under this agreement he agreed to accept the payment for Medicaid as a full payment for the services rendered, not to bill the patient for anything additional.

Q. All right. In addition to Medicaid, was there another program involved in this case?

A. Yes. There was the Department of Defense Program called CHAMPUS that stands for Civilian Health and Medical Program of the Uniformed Services. This is a program funded 100 percent by the federal government which pays medical benefits to dependents. In other words, spouses and children of people in the military.

In other words, people who are in the military or their wives or children are entitled to treatment care at military hospitals, but there are occasions when they have—they go to a civilian doctor when there not able to handle them at the doctor's office and CHAMPUS paid their bill in the [6] case and also billing for retired military people and their dependents. This was established according to federal law Title 10, US Code, Chapter 55 A and D, Department of Defense. Also set forth in the Naval officer's regulation 6010.8-R, which regulates how CHAMPUS charges and handled and paid.

Q. In addition to persons who you have mentioned, does it not also pay for expense to spouse and children of deceased, active duty and also for personnel for the spouses and children of deceased retired uniform forces personnel?

A. Yes.

Q. Okay.

A. And CHAMPUS as Medicaid pays its claims through what are called fiscal intermediaries. In other words, CHAMPUS enters into contracts with various insurance companies and the company—to handle their bill paying for them in regard to Virginia.

The fiscal intermediary between August 1, 1977 and September 30, 1981 was Blue Cross and Blue Shield of southwest Roanoke, located in Roanoke, Virginia, and from October 1st, '81 through the present the fiscal intermediary of Blue Cross of Blue Shield of South Carolina is located in Columbia, each of these agencies in return received claim forms from Dr. Alexander as well as other health care providers and then made payments to Dr. Alexander sending checks out to him through the U.S. mails to his office in [7] Virginia Beach.

The claimant makes his claim on a form 500 and a claim from 500 which he sends on to the fiscal intermediary and under CHAMPUS regulations when he signs that form, he is certifying that the medical care on that claim has really been provided to the patient whose name is listed on the form.

In other words all he is doing is certifying that he is telling the truth and he really claims to do this thing he put on the claim form, and, also, there are occasions when the CHAMPUS beneficiary—

For example suppose—if a military man retires and he has Blue Cross, he is eligible for insurance coverage at once and when that occurs, CHAMPUS regulations require the doctor to submit the claim form, indicate this other coverage so that we don't have two companies paying for the same procedure.

In other words, to avoid overpayment by the government and a third health care plan—in the indictment it is Blue Cross/Blue Shield of Virginia located in Richmond, Virginia, and there is an insurance claim to pay hospital, medical and surgical services established, under the authority of the code of Virginia 38.1-810.811 and here again, Dr. Alexander submitted claim to the Blue Cross and Blue Shield, in the provider number 01602 and he submitted health insurance claim form 95, that is what he used to indicate the name of [8] the patient, the patient's Blue Cross number and also what claim for medical services he claimed to have performed for the

patient, and as with the other two health care plans, Blue Cross/Blue Sheild of Virginia, he was on the claim forms to determine what the claim would be and have it mailed direct to him in the United States mail to his office in Virginia Beach, and that outlines the preliminaries in this indictment.

Q. Now, after seizing the records from Dr. Alexander's office and after auditing it and auditing the records.—

A. Yes, sir.

Q. And even prior to seizing the records, did you talk with various ex-employees of Dr. Alexander and ex-patients of Dr. Alexander?

A. Yes. I talked to people in both categories. He has had a number of the patients and over the years he has had a high number of employees. So there were a number of people who were exposed to the way he ran his office.

I also talked to a number of ex-patients of his who had seen him from time to time.

Q. What did you determine about his methods of doing business in relation to these three insurance providers?

A. Well, we determined as indicated in the indictment that he submitted on a routine basis claims to these three insurance providers for various medical tests and [9] procedures that he had in fact not really performed. He claimed on virtually every single claim to have performed a number of tests including a pregnancy test, a urinalysis and two different microscopic examinations of specimens taken from his female patients.

The purposes of the test, I should say, is to determine if there were various types of infections present, and on virtually all of the claims that he submitted to these three, Medicaid and CHAMPUS and Blue Cross of Virginia, he claimed to have performed all of these, but in fact from talking to his ex-employees and his patients, we determined that in most cases he had not done so.

In fact, in many cases he simply took the urine specimens and poured them down the toilet or down the sink without doing any test and he didn't run the pregnancy test at all. For the various microscopic tests, we found that in regard to the pregnancy test a number of women upon who he had performed various sterilizations and so he knew that they were sterilized. He made a claim and he claimed to have performed pregnancy tests on them.

Q. And these sterilization techniques, did they range from complete hysterectomy, tuliligation and removal of fallopian tubes and ovaries?

A. Yes, sir. All the patients that he performed of sterilizations we found instances in each case where he went [10] back and did pregnancy tests on them later.

Q. And was there a note in the records as to when he performed his pregnancy test? Did he routinely know that the patient thought they might be pregnant? Is that why he filed for the pregnancy?

A. Usually there was just a brief handwritten note, not even that. A brief note.

Q. He claimed to have done it?

A. He claimed, right.

Q. Did you make an examination of his purchase of pregnancy test for the records seized?

A. Yes. We looked at the purchase records over the years and found who he had done business with and we determined from about 1977 through the present, he purchased about 225 pregnancy test kits to perform 225 pregnancy tests.

Q. And just in the Medicaid area, how many pregnancy tests did he bill the government for on sterilized women?

A. 166 over the last five years.

Q. And you could only use one of these test kits for a pregnancy test?

A. Right, and along the same thinking, the urinalysis is the type of test he claimed to have performed by using the one urinalysis dip stick to dip into one specimen.

So in other words, one stick per specimen and from what I [11] believe it was from 77 to the present, he purchased approximately 200 urine dip sticks, but for these whom—these he made a claim to Blue Cross, he claimed to perform thousands of test per year.

Q. In fact, out of the purchase of the 200 dip sticks did he not send 100 of them back there for refunds and then he purchased 100 and sent them, then he purchased another 200 and then he sent them back for refunds and likewise for the various microscopic examination?

A. I feel that he did purchase this various dyes that he would need to take the specimens so that they could be examined promptly and they might be examined and the type he has was a small low powered type of microscope that would not have enough microscopic equipment to detect—to require him to see bacteria and might show what he was looking for in these various test.

Q. In fact, physicians who regularly conduct this type of microscopic examination would testify that the microscope Dr. Alexander had was totally inadequate for effectively performing these microscopic examinations; is that correct?

A. That is correct, yes, and also both CHAMPUS and Medicaid have a—required that they pay only for patient's who actually have some illness or injury.

In other words, they don't pay for routine [12] health care, for a woman's pap test and routine examination every six months or year. They don't pay for this, but what I fond on Dr. Alexander's claim forms was thereafter for every person with a common diagnosis of sickness, but we found—in talking with employees, we found that a good portion of his patients did come in simply for routine care which isn't covered by CHAMPUS and Medicaid leading to the inference that he put this diagnosis of illness on the claim form so that they would be covered by CHAMPUS and Medicaid.

Q. In addition, did the auditors find chargable a lot of blood pressure records?

A. Yes, sir. And for all the patients over six the blood pressure for the same person prevailed through a couple of years of visits and the same pressure would be listed on the charts of various patients and there are at least 400 patient's whose records were audited and in fact, some former employees have told us that you normally do not take a patient's blood pressure.

Q. Did you find the blood pressure equipment at the office when you did execute the search warrants?

A. There was not one in plain view. In other words, it didn't appear to be in plain view, but on the examination table, one of the investigators did find one. It didn't appear to be in use, though.

Also, there is the question of double billing to [13] CHAMPUS and Blue Cross and a number of—a number of them did have—eligible under both plans and we found though that when Dr. Alexander would submit to CHAMPUS he would fail to indicate on the form that the patient also had Blue Cross coverage. Also, the claim on the CHAMPUS form specifically says, "Does the patient have other coverage, yes or no," and in many places, we found that he would check the no block for—the information was checked. He had in a number of cases therefore paying duplicate for tests and operations that had already been paid by Blue Cross and CHAMPUS should have been paid only by Blue Cross since they are what this all—the first responsibility is to pay Medicaid and after that CHAMPUS comes in and pays the difference.

Q. There is something called the procedures code that are used in these billing procedures?

A. Yes. The doctor indicates what procedures are performed by a five-diget procedure code, and the procedure code is set forth in a booklet called the Physicians' Current Procedural Terminology. It is a thick volume that lists all the procedure codes for the various operations and office visits and tests that doctors will routinely perform and this is something that is standard use

throughout the medical profession and Dr. Alexander stated what procedures had been performed by these five-diget numbers and in some cases we found that Dr. Alexander would indicate on these claim forms.

[14] Q. The procedure he was billing for whether or not he had done it?

A. Right, he was claiming for work performed. We found that in some cases that the procedure he was claiming to have performed for—were more extensive than the procedure in fact performed. Take for example the code for office visits. The most extensive for an office visit is 90080 and also the code that would appear most frequently on these claim forms indicating that he performed a comprehensive service for his patient.

In other words, a physical examination and complete history and detailed counseltation, but from talking to the patients and to the former employees, we found that in most of the visits he did with these patient's were very much routine and customary.

In other words, the patient would come in and have a pelvic examination and she would have a preconference with Dr. Alexander, that would be it.

The auditors also examined his records and the methods and then CHAMPUS determined that most of the office visits could not be justified as maximum comprehensive and they moved him down a couple notches to file a brief and intermediary of care.

So in other words, he was overbilling the government for these various procedures—these various [15] office visits. He was billing for more extensive examination then he had really performed.

Q. And that reduction by the auditors was based on their review of Dr. Alexander's own files?

A. Right. They found the entries in his files did support an extensive and comprehensive—their only belief was to find that the patient was normal at that time, there were no problems or at the most one or two line handwritten entry was for preconference office visit

would—could expect considerable writing by the doctor as to patient's diagnosis and the patient's past history and problems, if any, and also general practice in the medical profession that when a patient has an operation that the follow-up visit to the doctor afterwards is included in the surgery fee.

In other words, the doctor does not charge extra for the visit after the operation. We found though that Dr. Alexander's patients, the first visit to him after the operation usually within a week or two afterwards, were billed separately to CHAMPUS and Medicaid.

In other words, he didn't include it in his standard surgical fees as the standard in the medical profession and as is required by CHAMPUS and Medicaid regulations.

And getting to the dollar amount now, the CHAMPUS auditors looked at Dr. Alexander's records of patients [16] who had CHAMPUS eligibility and compared what he claimed at that time were made and determine that at least $47,927.47 represented overpayment of either test not performed or improper double billings. The Blue Cross/Blue Shield of Virginia auditor for Blue Cross and Blue Shield found that they had overpaid him by at least $21,538.02 for various false claims submitted to them over the years and the investigators found that Dr. Alexander had overbilled them by least $20,874.25 and these claims were routinely sent to the—these three carriers and they in turn processed the claims, wrote the check to Dr. Alexander and sent them back to him by the U.S. mails.

Q. All right. Specifically, in the Count 1, I believe it is in paragraph five—six, Count 1—

A. Yes.

Q. Count 1 deals with one of these mailings, that is January 9, '81, the Defendant, Peter V. Alexander, received one of these checks by mail. The date is based on the date of the check, and there would be only at the most probably two or three days between the time the

check was directed to the health insurance plan and by the time it was received by Dr. Alexander.

I understand the payments came from Richmond, Roanoke or the farthest Columbia, South Carolina and Count 2 contains the same—essentially the same allegation that he [17] received a check from CHAMPUS in the case and he gives the check number and the check amount and the application is that is he received the check by mail as part of the scheme to defraud CHAMPUS.

In other words, he made these various false claims against CHAMPUS and that is the reason for the—he received the check back from CHAMPUS by the mail and Count 3 through, I believe, Count 12 all cover checks received from CHAMPUS and then starting with Count 13, we get into claims.

On all those, could you just recite the date and amount of check?

A. Count 2, the date is January 30th, 1981 and the Defendant received check number 9134473 from Blue Cross of southwest Virginia, Roanoke, Virginia in the amount of $1,451.46, which has been sent to him by the U.S. Postal Service.

Count 3, the date is February 24th, 1981 and he received a check number 9140754 from Blue Cross Blue Shield of southwest Virginia in the amount of $818.15.

Count 4, the date is June 2nd, 1981, check number 9162983 the amount is $1,255.55 from Blue Cross Blue Shield, southwest Virginia.

Count 5, dated January 7th, 1982. The check number is 00101877. The amount of the check is $2,816.65. The check was from Blue Cross/Blue Shield, South Carolina in [18] listing as the billing as intermediary CHAMPUS.

Count 6, the date is May 28, 1982. The check amount is $521.17. The check number is 00294858 from Blue Cross Blue Shield of South Carolina.

Count 7, the date is June 12th, 1982. The check number is 00306215. Check amount is $116.65 from Blue Cross/Blue Shield of Columbia, South Carolina.

Count 8 is dated August 13, 1982. Check number 00378075. The amount is $100.66 from Blue Cross Blue Shield of South Carolina.

Count 9 is dated September 6th, 1982 and the check number is 00415030 from Blue Cross/Blue Shield of South Carolina and the amount is $466.36.

Count 10 is dated September 30, 1982. The amount of the check is $1,161.49 and the check number is 00448239 from Blue Cross/Blue Shield of South Carolina.

Count 11. The date is November 9, 1982, check number is 00005707. The amount is $1,047.72 from Blue Cross/Blue Shield of South Carolina.

With Count 12 we begin the mail fraud counts involving Medicaid and beginning with Count 12 it alleges that on September 29, 1978, the defendant removed from a depository from mail box or in other words a mail box an envelope containing check number 0572239 from the computer company acting as an intermediary for Virginia Medicaid, the amount of [19] the check being $1,040.00.

Q. The previous checks that you discussed were addressed to 816 Independence Boulevard, Virginia Beach, Virginia; is that correct?

A. Right.

Q. And this check is at 533 Newtown Road, Virginia Beach, Virginia?

A. Right. That is back when he had the office on Newtown Road back in '78 and '79.

Q. Continue with Count 13.

A. Count 13 is dated October 27, 1978, a check to the Newtown Road address, check number 0593939 from the computer company and the amount is 1,345.50.

Count 14 is dated January 12th, 1979. The check was mailed to the address on Newtown Road. Check 0661370

from the computer company in the amount of $3,082 and no cents.

Count 14, date is February 23rd, 1979, addressed to Newtown Road and number 0695534 from the computer company in the amount of $1,428.

Count 15, date is February 23rd, 1979, addressed to Newton Road and number 0695534 from the computer company in the amount of $1,428.

Counts 16, date is April 13th, 1979 and this subsequent check is for Medicaid addressed to the Bayside address, 816 Independence Boulevard, Virginia Beach. The check number is 0734869 from the computer company in the amount of $1,983 and no cents.

Count 17, the date is July 20th, '79, for the [20] Independence boulevard address, check number 0113359 in the amount of $1,097.

Count 18, the date is September 28th, 1979, and the check number is 0169970, the amount of $697.

Count 19, the date is January 19, 1980. The check number is 0263572 the amount is $2,158.

Count 20, the date is February 22nd, 1980. The check number is 0293785, the amount of $2,037.

Count 21 has a date of May 16th, 1980, check number 0378374 in the amount of $872.

Count 22 is August 22nd, 1980, check number 0141100 in the amount of $1,185.

Count 23, the date is January 16, 1981, the check number is 0287140. The amount is $3,050.

Count 24 is March 27, 1981, check number 0360082 in the amount of $1,234.

Count 25, the date is July 3rd, 1981, check number 0507247 in the amount of $804.

Count 26, January 26, 1982 check number 0729379 in the amount of $699.30.

Beginning with Count 27, we start with the mail fraud counts against Blue Cross/Blue Shield of Virginia, Richmond, Virginia.

In Count 27 it charges that on June 10th, 1980, Dr. Alexander received at Bayside Medical Plaza, 816 [21]

Independence Boulevard check number 070330 from Blue Cross/Blue Shield of Virginia in the amount of $1,756.65, this check being sent by the U.S. Postal Service.

Count 28 charges that on July 7, 1981, he received another check from Blue Cross, check number 531088 valued at $469.

Count 29, the date is July 15th, 1980. The check number is 105770 in the amount of $896.35.

Count 30, the date is January 13, 1982, check number —I'm missing page 34 in my copy.

Count 31, the date is May 26, 1981. Check number 482667 in the amount of $958.65.

Count 32. Beginning with count 32, we're getting into very specific false claims involving CHAMPUS.

Count 32 charges that on or about August 22, 1980 Peter Alexander presented to CHAMPUS a claim for medical services allegedly given to Josephine Cortese, a patient of his and in this false claim, he claimed that Josephine Cortese did not have any other active insurance.

In other words, on this CHAMPUS form, he is required to disclose that the patient had other insurance, if a patient did. She did have in fact a policy under Blue Cross/Blue Shield of Virginia, but on this claim form, he checked the box that indicated no, she did not have other insurance.

[22] He was aware that she had other insurance because he himself had billed Blue Cross of Virginia for the same procedure for which he was billing CHAMPUS.

Count 33, the date is August 26, 1980. At this time, Dr. Alexander billed for services performed for another patient, a Miss Margret Adamson in claim the CHAMPUS, did you have any other insurance stating the—he signed the form indicating no, she had no other insurance when in fact she had a policy under Blue Cross and Blue Shield of Virginia, thus billing for the operation he already billed Blue Cross and then he billed CHAMPUS.

As the result of this claim, CHAMPUS paid him $600, whereas if he had truthfuly disclosed the existance of her

form, they would have paid $400 and checking into contracts the payment had-already been paid by Blue Cross.

Count 34 charges that on or about January 16, 1981, he billed CHAMPUS for procedures performed on Louise Ison I-s-o-n and here again, he indicated falsely on his claim form that Louise did not have any other insurance coverage when in fact she has a Blue Cross/Blue Shield of Virginia policy which had already made payment for a number of laboratory test which they shoud have paid but which CHAMPUS was not obligated to play because of his falsification of the claim form caused CHAMPUS to pay these test.

Count 35 charges that on or about April 14th, [23] 1981, Dr. Alexander billed CHAMPUS for medical services allegedly supplied to Frances Cox, a patient of his when he knew that that claim he submitted to CHAMPUS was false because he claimed—in his claim, he alleged that he had performed a pregnancy test on March 16, 1981, but he also was aware that he had done sterilization on her on January, 10, 1981 by removal of her fallopian tubes, or bilateral salpingectomy.

So in other words, he performed a sterilization in January 16, '81, but on March 16, '81, he claimed to perform a pregnancy test on her and was paid by CHAMPUS for doing so.

Count 36 charges that on or about June 2nd, 1981, he billed CHAMPUS for procedures allegedly performed for Lois Donaldson and this claim was false in two different ways.

Number one, the patient has surgery performed for her on March 1st, 1981 which involved a dilation of uterus and a D & C and a perminent sterilization by tubiligation. This operation taking place on November—excuse me, May 1st, 1981.

He then submitted CHAMPUS claim form for a subsequent post operative visit which was fraudulent in two cases.

Number one, his payment for this post operative visit has been taken care of for the May 1st operation, but he billed CHAMPUS for a separate visit.

[24] Number two he claimed that this May 1981 visit he performed the regular—a test on the Lois Donaldson only a week after the sterilization was performed on her and here again, CHAMPUS still paid on this claim relying on the assertions made on this claim form.

Count 37 charges that on or about June 30th, 1981, he submitted a claim for services performed on Patricia Repko, R-e-p-k-o, a patient of his and on this claim form to CHAMPUS he falsely stated that she did not have any other active insurance when in fact she did have a Blue Cross/Blue Shield policy of Virginia which had made payment to him.

So in other words his submission of falsified claims caused CHAMPUS to pay for claims which should and were paid by Blue Cross of Virginia.

Count 38. January 7, 1982, he presented a claim to CHAMPUS for medical services supplied to Evangeline Berka, B-e-r-k-a, and this claim is fraudulent in that he claimed to perform several tests including a urinalysis pregnancy test and two different smears which he had in fact had not performed and we know that he did not perform them because we talked to this patient Mrs. Berka and she told us he did not do that.

Q. She would have recalled whether he had given a uninalysis?

A. She said he did not take a urine specimen at all [25] and she said she didn't receive a pregnancy test. She has had no examination from him, period.

Count 39 also involves Mrs. Berka. Dr. Alexander submitted another claim, the claim visit on May 14, 1982 and this claim was fraudulent in two different ways.

Number one, first of all, Mrs. Berka had had an operation on December 18, 1981 and the visit was a follow-up to that operation and so the payment for the follow-up visit was covered in the surgical fee, but he billed

CHAMPUS for a separate visit, separate office visit which he should have not done.

Also, here again, the patient told us that she had not given a urine specimen. She has not had a pregnancy test. She had not had any of the procedures that Dr. Alexander billed or said he performed.

So this claim is fraudulent in two ways.

Number one he billed for office visits which had already been paid in his surgical fee and number two he billed or various tests that in fact had not been performed.

Count 40 is a falsified claim submitted to Medicaid. This involves a lady by the name of Patricia J-e-f-f-c-o-a-t who was working under cover for Virginia Medicaid at the time. She got a Medicaid card and went in posing as a Medicaid patient and received an office visit in which Dr. Alexander examined her. She did not give any urine [26] specimen. She did not have any smears taken from her or microscopic examinations and she did not have a pregnancy test and she was aware that she had not received this. However, Dr. Alexander turned around and used the Medicaid card presented to him and billed Medicaid for procedures which she knew that he had not performed.

Q. That offense occurred on August 17, 1981?

A. Yes. He submitted the claim on January 4, 1982.

Q. And all of this occurred in Virginia Beach, Virginia within the Eastern District of Virginia; is that correct?

A. Yes, sir.

Q. Grand jury have any questions of Agent Powell?

A JUROR: I was sort of interested in who initiated this investigation.

THE WITNESS: It began by a complaint from one of his former employees. She contacted a physician in the local area who referred her either to Blue Cross of Virginia or to Virginia Medicaid and the Department of Defense joined in the case later when it became clear that he also submitted a number of claims to CHAMPUS.

A JUROR: Did he have a lot of lab work done on these people or no lab work?

THE WITNESS: Virtually none. He did—some employees have told us he did the urinalysis on a few patients. [27] He would dip the dip stick in the specimen —he simply did not have the supplies or equipment to do the microscopic examination and he only had about 235 test pregnancy kits to perform the test.

A JUROR: Did he use the lab outside or—sometimes they use the lab at the hospital to do work for them. He did not use nothing like that?

THE WITNESS: No, for his past. Now, he has those sent thought the—performed the test that he billed for that he did not do, he did not have sent to an outside lab either.

A JUROR: Do you have any credentials where he graduated and where—

THE WITNESS: Well, it's a really complicated story. He was born in Romania.

He came to the United States and received his training and residence in Berlin, then graduated and went to Pittsburg, then moved from there and set up practice in North Carolina and moved to Virginia in the mid 70's, and he is a duly licensed physician in the Virginia Department of Medecine.

A JUROR: Did he have nurse or anything in his office?

THE WITNESS: Not a trained registered nurse, no, sir.

A JUROR: A woman or somebody in the office that [28] takes this mail in and the doctor does not actually get the mail. The nurse takes it in?

THE WITNESS: He had a lady working for him. One lady is combination secretary and receptionist. She handles the mail. They take administrative—they send it up, take the mail in and send it to us, then they take the check, they gave the check directly over to Dr. Alexander.

In other words, they just sort of received it and handed

it over to him. She was aware of everything that was going on in his office.

MR. MILLER: If I might call your attention to the language of the indictment in the mail fraud count, it says Peter V. Alexander removed and caused to be removed from an authorized depository of the mail, and it also sites 18 USC, Section 2, in each mail fraud count which is the—which we have gone over a number of times in the past which is the aiding and abetting, if you cause someone to do something in furtherance of a crime.

A JUROR: I know you're concerned with the indictments and the mail fraud issue, but is there any relationship or any involvement of the AMA that you would—I'm talking about his medical practice. Is there any relationship between you and some board that maybe interested in whether he is practicing medicine?

THE WITNESS: Well, his peers do considerable [29] damage to the reputation. In fact, he has been denied staff privileges at all but two hospitals in the Tidewater area. So his peers apparently have reservations about his capability and they are the major medical authorities in the world of medicine. In Richmond, there are a number of large concerns about his practice.

A JUROR: I was just trying to see if a new patient was maybe going there, maybe he is not giving them what would be considered adequate treatment. Maybe you have some viewpoint about his books for the next few months and so forth?

THE WITNESS: He has cut it down to virtually nothing. Starting in about February of this year, he did so, he cut his schedule down to virtually nothing.

A JUROR: He does not have any appointments scheduled until October?

THE WITNESS: That is correct.

A JUROR: And that was believed to be as a result of the execution of the search warrant at his office; is that correct?

THE WITNESS: Yes, his practice diminished considerably after that.

A JUROR: There are no malpractice suits running concurrent with this investigation?

THE WITNESS: Well, not as a direct—not tied [30] directly with the investigation. He has had malpractice suit in the the past, not getting into those extensively.

MR. MILLER: There being no further questions, Agent Powell may step down.

(Whereupon the witness was excused.)

[31] CERTIFICATE OF COURT REPORTER

I, Katherine A. Pennello. Shorthand Reporter, certify that I recorded verbatim by Stenotype the proceedings in captioned cause before the United States Grand Jury, Norfolk, Virginia, on May 9, 1983.

I further certify that to the best of my knowledge and belief the foregoing transcript constitutes a full, accurate and complete transcript of said proceedings.

Given under my hand this 16th day of June 1983, at Norfolk, Virginia.

/s/ Katherine A. Pennello
KATHERINE A. PENNELLO